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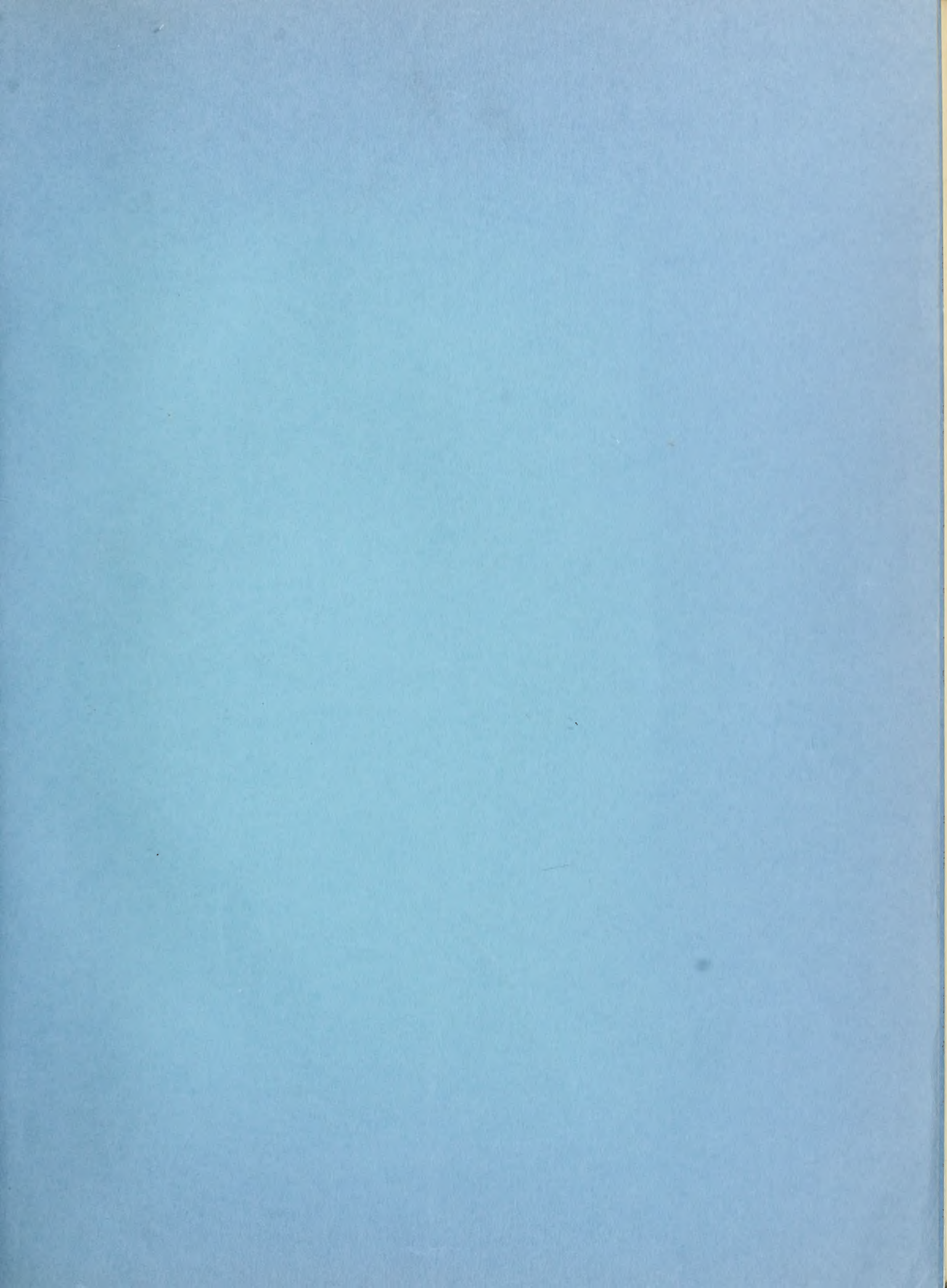
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUL 31 1968

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

JUL 25 1968

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APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HON. FRANCIS C. WHELAN, PRESIDING

DAVID B. FINKEL
849 South Broadway, Suite 412
Los Angeles, California 90014

Attorney for Appellee

HUGH R. MANES
6331 Hollywood Blvd., Suite 1112
Los Angeles, California 90028

Of Counsel



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Of Counsel



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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

NATURE OF THE CASE

Appellant was convicted of violation of 50 U.S.C.A. App. §462 (failure to submit to induction), and sentenced to prison for three years. He appeals therefrom, contending that the Local Board's order to report for induction was invalid, because, among other things, the Local Board failed to meet and consider his request for reopening of his classification, that said order was issued before the expiration of his appeal rights, and because the failure of the Local Board to reopen appellant's classification was arbitrary.

////

JURISDICTION

An indictment was filed on May 25, 1967, in the United States District Court for the Southern District of California, Central Division, No. 37153, charging appellant with violation of the Universal Military Training and Service Act (50 U.S.C.A. App. §462) in that he ". . . knowingly failed and neglected to perform a duty required of him under said act," by refusing to submit to induction on March 15, 1966, in Los Angeles County, after having been duly classified I-A by his Local Selective Service Board, and after having been duly notified and ordered to report for induction at said date and place (C.T. 1-2). [1]

Appellant was arraigned on said indictment on June 19, 1967, and plead not guilty (C.T. 3).

The case came on for court trial on October 5, 1967 before the Honorable Francis C. Whelan, District Judge presiding (C.T. 34), jury trial having been duly waived (C.T. 28, 35).

After evidence was received, and the government and defendant had rested, the case was continued for further proceedings to October 12, 1967 (C.T. 34). On the latter date, the matter was submitted by the parties to the Court for decision (C.T. 36).

1. C.T. refers to the Clerk's Transcript on file herein, and the numbers signify the pages thereof on which the cited reference may be found.

1 On November 29, 1967, the court found appellant
2 guilty. Appellant then waived a pre-sentence report, and
3 after he and counsel had made statements, the court sen-
4 tenced appellant to imprisonment for three years (C.T. 37,
5 38). [2]

6 Notice of Appeal was filed on December 6, 1967
7 (C.T. 39).

8 Jurisdiction of the District Court arose under 18
9 U.S.C.A. §3231. Review is sought here pursuant to 28 U.S.-
10 C.A. §§1291, 1294.

11 12 PROCEEDINGS IN THE TRIAL COURT

13 The Trial

14 The Government's case consisted solely of appellant's
15 Selective Service file, received in evidence without object-
16 ion as Exhibit "1" (R. 9/7-20, 10/2-3), [3] (supplemented by
17

18 2. The record does not include a Reporter's Trans-
19 cript of the proceedings held on either October 12 or
20 November 29, 1967, despite appellant's apparent request
21 therefor (C.T. 40, 45).

22 3. "R" refers to the Reporter's Transcript, con-
23 sisting of two volumes, of the oral proceedings had at
24 trial on October 5, 1967. The numbers to the left and right
25 of the slant bar refer, respectively, to the pages and lines
26 thereof on which the cited reference can be found.

1 the Government's Pre-Trial Memoranda [C.T. 9-24]), and an
2 F.B.I. investigative report, received in evidence in lieu
3 of testimony pursuant to stipulation, as Exhibit "2" (R. 10/
4 4-25, 11/6-7). With that, the Government rested (R. 11/10-
5 11).

6 The defense thereupon filed and served a written
7 motion for judgment of acquittal (R. 11/13-16), setting
8 forth eleven grounds therefor (C.T. 22-23).

9 After first reserving ruling thereon, the court
10 appears to have denied the motion without prejudice because
11 requiring oral evidence (R. 11/20-12/6). The record does
12 not disclose whether the motion was formally renewed or
13 whether any further rulings were made thereon.

14 The defense case consisted of appellant, who testi-
15 fied in his own behalf (R. 20-47), and the testimony of
16 the clerk of appellant's Local Selective Service Board
17 [No. 118] (R. 12-20). Three documents subpoenaed by
18 appellant from appellant's Local Board were identified by
19 the latter witness, and marked as Exhibits "A", "B" and
20 "C", respectively (R. 16/10-13, 16-25; 17/11-14); but
21 apparently none of the exhibits were offered or received
22 into evidence and no further reference thereto seems to
23 have been made by either party.

24 The balance of the trial, including the second
25 volume of the Reporter's Transcript, was taken up with
26 argument on the legal issues.

SUMMARY OF THE CASE

Appellant, a United States citizen by birth, was born on May 10, 1930, and registered (as a high school student) for Selective Service on May 12, 1956 (S.S.F. 2-3). [4] In his classification questionnaire (Form No. 100), filed June 10, 1957, appellant indicated he was a full time pre-dental student at U.C.L.A., but he did not claim that he was a conscientious objector (S.S.F. 10-11). On June 3, 1959, appellant's Local Selective Service Board (No. 118) classified him as I-A; but in November of that year, appellant was reclassified II-S (student deferment) (S.S.F. 12).

Appellant's II-S classification continued through September, 1964, during which period appellant attended and graduated from U.C.L.A. Medical School with a degree in medicine (S.S.F. 22-26, 30-31).

Appellant commenced his internship on July 1, 1964, at the University of Kansas Medical Center (S.S.F. 38), by reason of which he was reclassified on September 9, 1964 as II-A (occupational deferment) to July, 1965.

In the fall of 1964, the Board ordered appellant to take a pre-induction physical, and he was ultimately found acceptable on March 29, 1965 (S.S.F. 36, 40-42, 48). However

4. S.S.F. refers to appellant's Selective Service file received in evidence during the trial as Exhibit "1" (R. 10/2-3) and the numbers refer to the encircled page numbers therein.

1 appellant was reclassified I-A on Jan. 6, 1965, and a Form
2 110 notifying him thereof was mailed on the same date (S.S.F.
3 12, 13). Appellant did not appeal from said classification,
4 but on March 5, 1965, he wrote his Local Board inquiring as
5 to the reason for his reclassification from II-S (sic) to
6 I-A, "and what it means" (S.S.F. 43). The Board replied on
7 March 10, 1965, stating that:

8 "Reclassification was undertaken in the light
9 of the evident need for physicians in the Armed
10 Forces. You will not be denied the opportunity
11 to complete your internship even though you are
12 classified in I-A" (S.S.F. 45).

13 On April 13, 1965, appellant's Local Board sent him
14 an order to report for induction on July 1, 1965, together
15 with a letter advising him of the opportunity for a naval
16 commission (S.S.F. 50-51). On April 27, 1965, appellant's
17 Local Board was informed by Cedars-Sinai Medical Center in
18 Los Angeles, California that appellant had been accepted
19 there as a resident doctor training in pediatrics (S.S.F.
20 50-61). The Board wrote the State Director for instructions
21 and was advised by letter to cancel appellant's induction
22 notice, and to change appellant's classification upon re-
23 ceiving confirmation of his actual employment (S.S.F. 61).

24 On April 29, the Local Board sent appellant noti-
25 fication that his induction orders had been cancelled;
26 and on August 4, 1965, appellant was reclassified II-A to

1 August, 1966 (S.S.F. 13).

2 On October 7, 1965, appellant's Board received a
3 request from the State Director to forward appellant's
4 files for review (S.S.F. 76). On that date, the Board
5 ordered appellant to report for a pre-induction physical
6 on October 23, 1965 (S.S.F. 78).

7 On October 20, 1965, the State Director returned
8 appellant's file to the Local Board with an accompanying
9 letter "recommending" that appellant "be considered for
10 reclassification" as I-A, that is, available for induction,
11 and requesting a return of the file for further review "if
12 this physician is classified in a class other than I-A or
13 I-A-O." (S.S.F. 80)

14 On October 25, appellant wrote his Board a letter
15 explaining that he was unable to report for his physical
16 because of a conflict with his duties at the hospital
17 (S.S.F. 81). A second notice was sent (to the wrong
18 address), and this appointment was apparently kept for he
19 was ultimately found acceptable for service (S.S.F. 84, 89).

20 On November 29, 1965, the Local Board received a
21 letter from appellant's superior, the Director of the
22 Division of Pediatrics at Cedars-Sinai Medical Center,
23 stressing the need for trained pediatricians and requesting
24 that appellant's deferment be maintained to allow him to
25 complete his training in that field to July 1, 1967 (S.S.F.
26 86-88).

1 On January 24, 1966, the Local Board voted 2-0 to
2 reclassify appellant I-A, and sent him a notice of said
3 classification (S.S.F. 13). The record does not disclose
4 whether he was advised of his right to appeal or to
5 personal appearance; but on January 31, 1966, the Local
6 Board received appellant's letter, appealing his reclassi-
7 fication to I-A from II-A "which I do believe I should be
8 at this time." (S.S.F. 90)

9 The Appeals Board voted 3-0 to sustain a reclassi-
10 fication and on February 25, 1966, the Local Board mailed
11 appellant another Form 110 notifying him of the Appeals
12 Board's decision (S.S.F. 13).

13 On February 28, 1966, the Local Board sent appell-
14 ant an order to report for induction on March 15, 1966
15 (S.S.F. 94).

16 On that same date, the Board received a letter
17 from appellant, dated February 26, claiming status as a
18 conscientious objector (I-O), and requesting that he be
19 sent a Form 150 (S.S.F. 98).

20 Neither the induction notice nor appellant's said
21 letter bear a time stamp. The Board's minutes showed
22 typewritten entries in that sequence (S.S.F. 13).

23 A Form 150 was mailed to appellant on March 2,
24 1966 (S.S.F. 13, 104) directing the completion and return
25 of same on or before March 8, 1966. On the latter date,
26 the Board received appellant's Form 150, duly completed

1 and signed (S.S.F. 104-108).

2 On March 7, 1966, the Board received appellant's
3 letter protesting the inadequacy of time allowed for com-
4 pletion of the Form 150, objecting to the treatment of his
5 claim "as a late request", and asking that his induction
6 notice be cancelled pending disposition of his conscientious
7 objector claim (S.S.F. 99-100).

8 On March 11, 1966, the assistant coordinator of
9 the Local Board mailed appellant a letter acknowledging
10 "receipt of your communication relative to your Selective
11 Service status," and notifying appellant that:

12 "The information contained therein has
13 been considered by this Board and it is
14 of the opinion that the facts presented
15 do not warrant the reopening or reclassi-
16 fication of your case at this time."

17 (S.S.F. 110)

18 However, the minutes of appellant's file reflect
19 the following entry after the date of March 10, 1966:

20 "Board members contacted, file reviewed
21 new information does not warrant reopening
22 of classification, Must report for In-
23 duction as ordered (sic)."

24 Furthermore, it appears from the trial testimony
25 of Mrs. Armand, the assistant coordinator of the Board,
26 that no meeting of the Local Board was held following

1 receipt by the board of appellant's application for re-
2 opening his classification; rather, Mrs. Armand contacted
3 two of the three members by phone--the third member being
4 unavailable--and polled them on the question of reopening
5 (R. 18/23-19/19). An attempt by defense counsel to in-
6 quire into the substance of the telephone conversation was
7 barred by the trial court's ruling (R. 19/6-9).

8 Appellant reported to the induction center on
9 March 15, 1966, but refused to step forward (S.S.F. 113-
10 114). He also refused a commission in the United States
11 Navy (S.S.F. 130).

12 Appellant's prosecution and conviction followed.

14 SPECIFICATION OF ERRORS

15 1. Appellant was deprived of due process of law
16 which vitiated his conviction by reason of:

17 (a) The failure of the Local Board to hold a
18 meeting and consider thereat his request for reclassifica-
19 tion as a conscientious objector;

20 (b) The failure of the Local Board to reopen
21 appellant's classification after he presented new facts
22 making out a prima facie case for classification as a con-
23 scientious objector;

24 (c) The issuance of an induction order by the
25 Board prior to the expiration of appellant's time for ad-
26 ministrative appeal.

1 2. The evidence is insufficient in that it does
2 not support the allegation in the indictment that
3 appellant failed and neglected to perform a duty required
4 of him under §462 of 50 U.S.C.A. App., for all of the
5 reasons set forth in Specification No. 1, and for the
6 additional reason that the Local Board acted in excess of
7 its jurisdiction by failing to comply with Selective
8 Service Regulations which afforded appellant procedural
9 due process rights.

10
11 QUESTIONS PRESENTED

12 1. Whether the telephonic polling of members of
13 the Local Board by the clerk thereof on appellant's appli-
14 cation for reopening of his classification constituted a
15 meeting of the Local Board within the meaning of Selective
16 Service Regulations §§1604.56, 1604.58 and 1625.2.

17 2. Whether appellant was deprived of due process
18 of law and a full and fair consideration of his conscient-
19 ious objector claim by the failure of the members of the
20 Local Board to read or consider such claims at a meeting.

21 3. Whether appellant's application for classifica-
22 tion as a conscientious objector made out a prima facie
23 case therefor, and thereby required the Board to cancel
24 appellant's order to report for induction, and to reopen
25 appellant's classification and classify him anew.

26 4. Whether the Local Board's failure and refusal

1 to reopen appellant's classification was arbitrary and
2 deprived him of his appearance and appeal rights under the
3 Selective Service regulations, thereby vitiating his order
4 to report for induction.

5 5. Whether appellant's induction notice was illegal
6 and ineffective within the meaning of Selective Service
7 Regulations §1626.41 by reason of having been mailed to
8 appellant before his right to appeal under Selective
9 Service Regulations §1626.61(b) had terminated.

10
11 MOTION TO REMAND TO TRIAL

12 COURT FOR FURTHER PROCEEDINGS

13 Appellant's Selective Service File (pp. 12-14)
14 shows that for nearly four years, only two members of the
15 Local Board voted on matters affecting appellant's status
16 and classification. The record at bar does not disclose
17 the reason therefor, and so counsel has attempted to deter-
18 mine whether the Board was properly constituted during said
19 period, and particularly when voting on matters affecting
20 appellant's classification and status. If, at such times,
21 the Board was not composed of three or more members
22 (Selective Service Regulations §1604.52), then it may well
23 be that the Board had no jurisdiction to classify appellant
24 or issue orders affecting appellant's status. (Compare:
25 Brede v. United States, No. 21,928, decided 5/27/68 [9th
26 Cir.])

1 Counsel, who did not participate in the trial
2 of this case, did learn from an assistant clerk of
3 said Board, that for at least a portion of the period
4 in question, the Local Board was comprised of only two
5 members, the third having died. However, the clerk
6 refused to disclose the extent or duration of the period
7 during which only two members were on the Board, stating
8 that she would disclose such information only upon
9 order of her superiors or by court order.

10 Since this is a matter affecting the jurisdiction
11 of the Local Board to issue valid induction orders,
12 appellant respectfully moves that the case be remanded
13 to the trial court for further proceedings and findings
14 on this issue; and that such findings be transmitted
15 to this Court, be made a part of the record, be briefed
16 by the parties hereto, and be submitted with the other
17 points raised herein, for decision by this Court.

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ARGUMENT

1

THE TELEPHONIC POLLING OF THE MEMBERS OF
APPELLANT'S LOCAL BOARD ON WHETHER HIS
CLASSIFICATION SHOULD BE REOPENED WAS NOT
A MEETING AS REQUIRED BY THE SELECTIVE
SERVICE REGULATIONS AND DEPRIVED APPELLANT
OF DUE PROCESS OF LAW WHICH VITIATED HIS
INDUCTION NOTICE AND HIS CONVICTION.

1. Selective Service Regulations §1604.56 provides,
in pertinent part, as follows:

" . . . A majority of the members of the
local board shall constitute a quorum for
the transaction of business. A majority
of the members present at any meeting at
which a quorum is present shall decide any
question or classification. Every member
present, unless disqualified, shall vote
on every question or classification. . .

If any member is absent so long as to
hamper the work of the local board [the
chairman shall recommend removal and
appointment of a new member]."

S.S. §1604.58 provides:

'Minutes of meetings--Each local board
shall keep a record of each meeting of

1 the board as minutes of local board
2 meeting (SSS Form 112) which shall be
3 filed by the local board as minutes of
4 its meetings."

5 S.S. Regulation §1625.1 states, in relevant part:

6 "The local board may reopen and consider
7 anew the classification of a registrant
8 (a) upon the written request of the
9 registrant. . . if such request is
10 accompanied by written information pre-
11 senting facts not considered when the
12 registrant was classified, which, if
13 true, would justify a change in the
14 registrant's classification. . .".

15 2. Failure of the Local Board to comply with
16 regulations which accord procedural rights to a registrant
17 renders the registrant's classification and induction order
18 invalid.

19 Fischer v. United States,

20 C.A. 9th, 1934, 216 F.2d 266, 269;

21 Wade v. United States,

22 C.A. 9th, 1952, 200 F.2d 398, 401.

23 3. The telephonic polling of the members violated
24 Selective Service Regulations §1604.56 in that the board
25 members purported to decide a question affecting appellant's
26 status and classification in the absence of a quorum.

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Indeed, since the assistant coordinator of the Board telephoned two of the members (W. 10/23-10/19), the inference is compelling that the Board members themselves never read or reviewed appellant's claim before voting thereon. This inference is strengthened by the notation entered in the minutes of action appended to appellant's questionnaire for the date 8/10/66, indicating: "Board members contacted and reviewed: . ." (S.B.F. 14).

5. "64. A quorum of an assembly is such a number as must be present in order that business can be legally transacted. The quorum refers to the number present, not to the number voting." Robert's Rules of Order, Rev., Scott, Foresman & Company, 1951, at p. 257.

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1 The best of the speaker's information has been given
2 over the telephone to the two members, pending decision on
3 motion is that the above would not constitute the communi-
4 cation with the two members (W, 23/5).

5 The regulations are intended to have the claims
6 fairly and fairly considered and acted upon by the Local
7 Board.

8 Section 4, United States, supra,
9 332 F.2d 338, 401.

10 United States v. Franklin,

11 304 F.2d 1933, 225 F.2d 114, 115, 117.

12 6. A Local Board member fairly consider a claim
13 the members have neither seen nor discussed among them-
14 selves.

15 7. A mere telephonic vote does not satisfy the
16 implicit requirements of Selective Service Regulations
17 11604.5) that all questions and determinations be decided
18 by and at a meeting of the Local Board.

19 United States v. Franklin (D.C., 1960),
20 20 F. Supp. 115 (holding an alternative
21 functional regulation, i.e., 11604.5(c)
22 deferred not satisfied by a telephonic
23 vote);

24 Compton v. United States, supra,
25 holding an order to report for alternative
26 civilian work under S.S. §1660.20 (b)

1 to be invalid where not shown to
2 have been issued at a meeting of the
3 Local Board.

4 8. That telephonic decisions do not comply with
5 Selective Service Regulations, and deny appellant's
6 substantial due process of law, is recognized by the
7 Selective Service system itself. Thus, Local Boards
8 have been instructed by the California Headquarters of
9 the Selective Service System, in an operation memorandum
10 dated October 18, 1967, to hold special meetings and, if
11 necessary, to postpone induction orders, in order to
12 consider conscientious objector claims filed after the
13 mailing of an induction notice. The memorandum above
14 cited expressly admonishes Local Boards that: "A mere
15 telephone review of the file is inappropriate."

16 More recently, State Headquarters issued an
17 operation memorandum, dated June 10, 1968, relating to
18 conscientious objector claims filed under S.S. §1625.2,
19 and other regulations, a pertinent portion of which reads
20 as follows:

21 "In the event the completed SSS Form 150
22 is returned after an induction order is
23 issued but before the induction date and
24 there will be a regularly scheduled meet-
25 ing of the local board before the induction
26 date, the entire file and the Special Form

1 for Conscientious Objector shall be re-
2 viewed by the local board. If the form
3 is returned prior to the induction date
4 and there will be no regularly scheduled
5 meeting of the local board before the in-
6 duction date, the registrant's induction
7 shall be postponed so that the local board
8 can consider the information contained in
9 the form at a regularly scheduled meeting."

10 9. For the foregoing reasons, therefore, it would
11 appear that appellant was deprived of substantial procedural
12 rights by the failure of the Board to make its decision
13 on his application at a duly constituted meeting as re-
14 quired by Selective Service Regulations. Since the Board
15 thereby acted in excess of its jurisdiction, the evidence
16 is insufficient to establish that appellant failed and
17 neglected "to perform a duty required of him under §462
18 of 50 U.S.C.A. App.".

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II

APPELLANT'S FORM 150 MADE OUT A PRIMA
FACIE CASE FOR CLASSIFICATION OF APPELLANT
AS A CONSCIENTIOUS OBJECTOR, AND THEREFORE
THE BOARD'S REFUSAL TO RE-OPEN HIS CLASSI-
FICATION WAS ARBITRARY AND A DENIAL WITH-
OUT DUE PROCESS OF LAW OF APPELLANT'S
APPEARANCE AND APPEAL RIGHTS UNDER THEN
EXISTING SELECTIVE SERVICE REGULATIONS,
THEREBY INVALIDATING HIS INDUCTION ORDER
AND HIS CONVICTION.

1. As heretofore noted, S.S. Regulation §1625.2
permits a Local Board to re-open a registrant's classifica-
tion when his request--

". . . is accompanied by written informa-
tion presenting facts not considered when
a registrant is classified, which, if true,
would justify a change in the registrant's
classification. . ." [6]

6. §1625.2 also provides that no classification
shall be re-opened after the mailing of an induction notice
unless the local board specifically finds a change in the
registrant's status resulting from circumstances beyond his
control.

That proviso is not pertinent here because the local
board, by placing its refusal to re-open on the sole (cont.)

1 2. When a classification is re-opened and con-
2 sidered anew, the resultant classification has the effect
3 of an original classification, even though the registrant
4 is placed in the same class as before reopening.

5 Selective Service Regulation §1625.11;

6 See: Miller v. United States, C.A. 9, 1967,
7 388 F.2d 973.

8 3. Each such re-classification is "followed by
9 the same right of appearance before the Local Board and
10 the same right of appeal as in the case of an original
11 classification."

12 Selective Service Regulation §1625.13;

13 See: United States v. Freeman, C.A. 7, 1967,
14 388 F.2d 246;

15 6. (cont.) ground that the "new information does not
16 warrant reopening of classification" (S.S.F. 14), appears
17 thereby to have treated appellant's claim as an application
18 filed prior to the mailing of his induction notice.

19 Implicit in the board's notation is its acknowledge-
20 ment that the acquisition of conscientious objector be-
21 liefs arises from circumstances beyond a registrant's
22 control. Such is also the view taken by courts of other
23 circuits (United States v. Federspiel [N.D. Ohio, 2/19/68],
24 No. C.R. 240; United States v. Baker [E.D.N.Y., 2/19/68]
25 67 CR 19; see also: Boswell v. United States, C.A. 9,
26 1965, 330 F.2d 181.)

1 Olvera v. United States, C.A. 5th,
2 1955, 223 F.2d 880.

3 4. Moreover, at the time of appellant's appli-
4 cation, and the Local Board's denial thereof, appellant
5 was entitled to special appeal procedures reserved for
6 conscientious objector claimants, including referral of
7 such claims to the Department of Justice for investigation
8 and recommendation, and a hearing before an impartial
9 referee.

10 Selective Service Regulations §1626.25;
11 See: MacMurray v. United States, C.A. 9th,
12 1964, 330 F.2d 928.

13 5. These rights of appearance and appeal are a
14 substantial and indispensable facet of the Selective
15 Service classification system; and a conviction may not
16 obtain under 50 U.S.C.A. App. §462, where such rights
17 have been abrogated or denied by a Local Board.

18 Boswell v. United States, C.A. 9th, 1968,
19 390 F.2d 181;

20 MacMurray v. United States, supra,
21 330 F.2d 928;

22 United States v. Freeman, supra,
23 388 F.2d 246, 248;

24 United States v. Stepler, C.A. 3rd, 1958,
25 258 F.2d 310, 315;

26 ////

1 Olvera v. United States, supra,

2 223 F.2d 880;

3 Striker v. Reed, D.C.N.J., 1968,

4 283 F.Supp. 923.

5 6. A Local Board may not arbitrarily refuse to
6 reopen and reclassify a registrant even if ultimately the
7 Board decides to retain him in the same class to which he
8 had been assigned before re-opening.

9 See: Miller v. United States, supra,

10 388 F.2d 973;

11 Olvera v. United States, supra.

12 7. If a registrant seeking to have his case re-
13 opened, submits new facts not previously presented which
14 makes out a prima facie case for a different classification,
15 the Local Board is required by law to re-open the case.

16 United States v. Walsh, D.C. Mass., 1968,

17 279 F.Supp. 115, 120;

18 Miller v. United States, supra;

19 Stain v. United States, C.A. 9th, 1956,

20 235 F.2d 339;

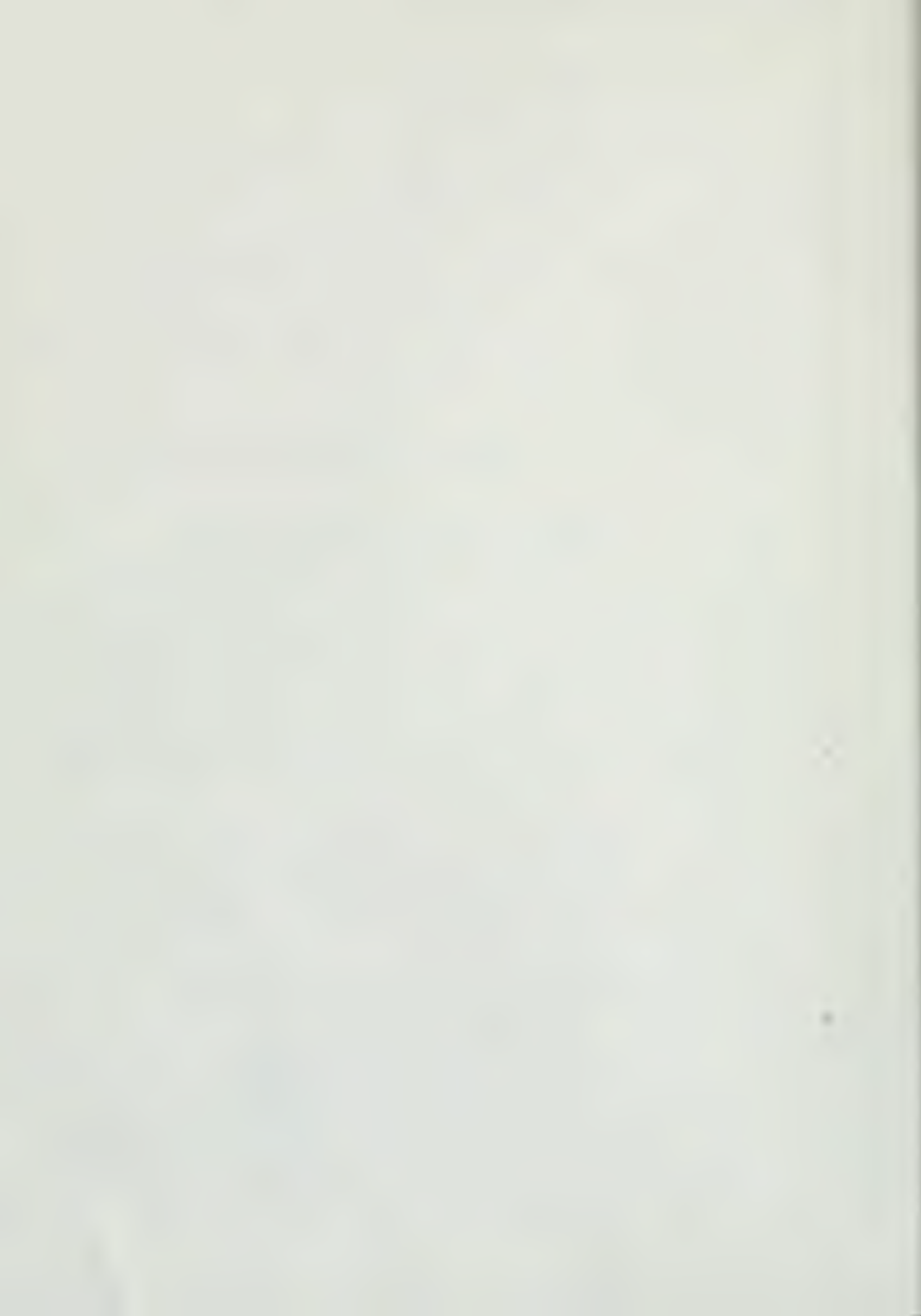
21 United States v. Freeman, supra,

22 388 F.2d 246, 249;

23 See: United States v. Garcia, D.C.C.D.Cal.,

24 1/22/68, No. 1265 (holding by

25 Judge Irving Hill re ministerial
26 exemption).



1 8. Appellant's letter seeking classification as a
2 conscientious objector, and requesting a Form 150, arrived
3 on the same day that the Local Board mailed him his order
4 to report for induction (S.S.F. 13).

5 The Board mailed appellant a Form 150 on March 10,
6 directing that it be completed and filed no later than
7 March 9. It was; whereupon, the Board apparently treated
8 the form as an application to re-open his classification,
9 and conceded that the information provided therein was
10 new.

11 Thus, the notation entered on March 10 in the minutes
12 appended to appellant's questionnaire read:

13 "Board members contacted file reviewed
14 new information does not warrant re-
15 opening of classification, Must report
16 for Induction as ordered" (sic).

17 See: Miller v. United States, supra;

18 United States v. Baker, supra;

19 United States v. Ehrlich (D.C.N.Y., 1966),

20 257 F.Supp. 906;

21 United States v. Soberak, D.C. Ga., 1966,

22 264 F.Supp. 752.

23 9. Appellant's claim having been filed prior to
24 the enactment of the 1967 amendment to 50 U.S.C.A. App.
25 6(j), the principles enunciated in Seeger v. United States,
26 1965, 380 U.S. 163, 35 S.Ct. 850, would apply in determining

1 whether appellant made out a prima facie case for re-
2 opening.

3 10. In his Form 150, appellant acknowledged belief
4 in a Supreme Being, and described objection to war in
5 relation thereto (S.S.F. 104-105). Appellant opposed
6 war "because of its disrespect and irreverence for life"
7 (S.S.F. 105), and rejected the use of force except where
8 "controlled, non-violent [and] wholly to the specific goal";
9 that is, a force which is "creative" or helpful. Appellant
10 also believed that force "derived from an impulse to self-
11 preservation could be justified only if all other remedies
12 are exhausted thoroughly."

13 Compare: Sicurella v. United States, 1955,

14 348 U.S. 385, 75 S.Ct. 403;

15 Kretsch v. United States, C.A. 9th

16 1960, 284 F.2d 531;

17 United States v. Sage, D.C. Neb.,

18 1954, 118 F.Supp. 33.

19 While appellant did not claim membership in a
20 religious sect or congregation at the time of filing his
21 Form 150, such affiliation is not a prerequisite to
22 classification as a conscientious objector.

23 Sicurella v. United States, supra;

24 Sage v. United States, supra;

25 United States v. Alvies, W.D.Cal., 1963,

26 112 F.Supp. 610.

1 However, appellant did ascribe his conscientious
2 objector beliefs to his religious "upbringing in the
3 Jewish faith" as well as his medical training. [7]

4 See: United States v. Stolberg, C.A. 7th,
5 1965, 346 F.2d 363.

6 The mere fact that appellant had previously claimed
7 and was given a II-A classification does not, of course,
8 defeat his claim to a conscientious objector classification,
9 not only because a II-A classification is lower than a
10 I-O, and therefore takes priority, (S.S. Regulation §1623.2)
11 but also because a registrant has a right to claim success-
12 ive deferments on different grounds.

13 United States v. Peebles, C.A. 7th, 1955,
14 220 F.2d 114, 118.

15 11. It would thus appear that on its face,
16 appellant's claim makes out a valid case for a classi-
17 fication as a conscientious objector; and therefore, the
18 Board's failure to reopen his classification was arbitrary
19 and constituted a denial of appellant's procedural rights
20

21 7. It may be noted that appellant had less than
22 four days in which to complete and file the Form 150,
23 rather than the 10 days usually allotted for this pro-
24 cedure. (See: The box in the upper right hand corner
25 of appellant's questionnaire, S.S.F. 12).
26

////

1 without due process of law.

2 By reason thereof, appellant's induction notice
3 was invalid and his conviction cannot stand.

4
5 III

6 THE INDUCTION NOTICE WAS INVALID AND VOID
7 BECAUSE MAILED BEFORE THE EXPIRATION OF
8 APPELLANT'S TIME FOR APPEAL HAD EXPIRED.

9 1. S.S. Regulation §1626.41 states:

10 "The local board shall not issue an order
11 for a registrant to report for induction
12 either during the period afforded the
13 registrant to take an appeal to the
14 appeal board or during the period such
15 an appeal is pending. Any order to report
16 for induction which has been issued during
17 either of such periods shall be ineffective
18 and shall be cancelled by the local board.
19 Whenever an appeal to the appeal board has
20 been taken by a person entitled to do so,
21 any order to report for induction which
22 has previously been issued to the registrant
23 shall be ineffective and shall be cancelled
24 by the local board."

25 2. S.S. Regulation §1626.61(b) provides:

26 "At any time within 10 days after the

1 date when the local board mails to the
2 registrant a Notice of Classification
3 (SSS Form No. 110). . . or at any time
4 before the registrant is mailed an Order
5 to Report for Induction (SSS Form No. 252),
6 the government appeal agent, if he deems
7 it to be in the national interest or
8 necessary to avoid an injustice, may
9 prepare and place in the registrant's
10 file a recommendation that the State
11 Director of Selective Service either
12 request the appeal board to reconsider its
13 determination or appeal to the President.
14 The registrant's file shall then be
15 forwarded to the State Director of
16 Selective Service.

17 * * *

18 3. S.S. Regulation §1604.71 provides for government
19 appeal agents, and establishes their duties, in pertinent
20 part, as follows:

21 "(d) It shall be the duty of the govern-
22 ment appeal agent. . .

23 "(1) to appeal. . . from any classi-
24 fication of a registrant by the
25 local board which is brought to
26 his attention and, in his

1 opinion, should be reviewed
2 by the appeal board.

3 * * *

4 (5) to be equally diligent in pro-
5 tecting the interests of the
6 government and the rights of
7 the registrant in all matters."

8 (Emphasis supplied.)

9 4. His internship having been completed, appellant
10 sought (through his prospective employer) and received from
11 the Board, a II-A classification (occupational deferment)
12 to permit him to take up a one year residency training in
13 pediatrics at the Cedars-Sinai Medical Center in Los
14 Angeles (S.S.F. 13, 59-63, 70, 73-75).

15 It may be noted from the Board minutes appended to
16 appellant's questionnaire (S.S.F. 13) that the II-A
17 classification was granted on August 4, 1965; and that a
18 handwritten notation appears after the date as follows:

19 "2a 8/66"

20 It is thus apparent that the Board intended to and
21 did grant appellant an occupational deferment of at least
22 one year, based in large part, presumably, upon the re-
23 commendations of Dr. Kagan, Director of Pediatrics at the
24 Center (S.S.F. 59-60), and Dr. L. S. Goerke, Chairman of
25 the Southern California Advisory Committee of the Selective
26 Service System (S.S.F. 70).

1 5. For reasons not disclosed in this record,
2 the State Director, on October 20, 1965, "recommended"
3 that appellant be reclassified as available for service,
4 i.e., I-A (S.S.F. 80).

5 6. Appellant was promptly ordered by the Board to
6 report for pre-induction physical (S.S.F. 79-84), and he
7 ultimately did so and was found acceptable (S.S.F. 81, 89).

8 7. On January 24, the Local Board reclassified
9 appellant I-A (S.S.F. 13); and appellant filed a timely
10 appeal (S.S.F. 13, 90).

11 8. Appellant's classification was affirmed by the
12 Appeals Board on February 24, 1966, (S.S.F. 4) and on
13 February 25, 1966, the Board mailed appellant SSS Form 110,
14 notifying him of the Board of Appeals' decision (S.S.F. 13).

15 9. Three days later, on February 28, the Local
16 Board mailed appellant an Order to Report for Induction
17 on March 15, 1966.

18 10. In a criminal prosecution under the Universal
19 Military Training and Service Act, the burden is on the
20 government to establish the validity of the induction order,
21 and on issues relating thereto, the record is to be viewed
22 in the light most favorable to the accused.

23 Franks v. United States, C.A. 9th, 1954,
24 216 F.2d 266, 269.

25 11. Although the standard form 110 (Notice of
26 Classification) advises a registrant of his right to seek



1 the advice of an appeal agent, it nowhere appears from
2 this record that appellant did so.

3 More to the point, the record fails to show that
4 the Local Board advised appellant that an appeal agent
5 might, in an appropriate case, seek reconsideration of his
6 appeal under Selective Service Regulations §1626.61(b).
7 Since this was obviously an important and substantial right,
8 the Board's omission deprived the appellant of due process
9 of law.

10 United States v. Giesel, D.C.N.J., 1965,
11 129 F.Supp. 223;

12 United States v. Sobczak, D.C.Ga., 1966,
13 264 F.Supp. 752.

14 12. Appellant's Selective Service File disclosed
15 a plausible basis for an appeal agent's recommendation.
16 Dr. Kagan's letter to the board iterated a critical national
17 need for pediatricians (S.S.F. 86-08); and appellant's
18 reclassification in the middle of his residency, a few
19 months after the promise of a one year deferment, makes
20 out a prima facie case of hardship and injustice.

21 At least, the circumstances attendant the re-
22 classification, coupled with what additional facts
23 appellant may have provided the appeal agent, may well
24 have led the latter to believe there was a genuine and
25 sufficient basis for further review under Selective
26 Service Regulations §1626.61(b).

1 13. By mailing the induction notice prematurely,
2 and by failing to advise appellant of his rights under
3 Selective Service Regulations §1626.61(b), the Local
4 Board deprived appellant of the opportunity and possibility
5 of securing a change in his classification through an
6 appeal agent, and thereby viciated its induction order.

7 United States v. Stepien, C.A. 3rd, 1958;
8 258 F.2d 310, 315.

9 14. Moreover, appellant's time for appeal under
10 Selective Service Regulations §1626.61(b) had clearly
11 not yet expired when the Board mailed his induction
12 notice. Therefore, by virtue of Regulation §1626.41,
13 the Board's induction order, mailed only three days after
14 the mailing of appellant's Notice of Classification
15 (Form 110), was "ineffective and void.

16 See: United States v. Herdman, D.C. Wisc.,
17 1956, 143 F.Supp. 742, 745-746;

18 Compare: Seitler v. Mason, supra,
19 283 F.Supp. 923.

20 15. Accordingly, the evidence is insufficient to
21 that, on this record, appellant was under no duty to
22 submit to induction as charged by the indictment; and his
23 conviction must be reversed.

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Respectfully submitted,

HUGH R. MANES, Of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

33



N O. 2 2 7 2 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellant.

FILED

SEP 4 1968

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,

United States Attorney,

ROBERT L. BROGIO,

Assistant U. S. Attorney,

Chief, Criminal Division,

ERIC A. NOBLES,

Assistant U. S. Attorney,

1200 U. S. Court House

312 North Spring Street

Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
ERIC A. NOBLES,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant LEON LEONARD MIZRAHI was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on May 25, 1967, in Case No. 37153-CD [C. T. 2-3]. ^{1/} The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Refusal to be Inducted.

^{1/} "C. T. " refers to Clerk's Transcript of Record.

On June 19, 1967, appellant was arraigned before the Honorable William P. Gray, United States District Judge and entered a plea of not guilty [C. T. 4]. Appellant was represented by retained counsel at all stages of the proceedings. On October 5, 1967, a jury trial commenced before the Honorable Francis C. Whelan, United States District Judge. The decision was continued until November 29, 1967, on which date the appellant was found guilty. Appellant was sentenced to the custody of the Attorney General for a term of three years with bond on appeal set at \$250.00 personal surety [C. T. 39]. A timely notice of appeal was filed on December 6, 1967 [C. T. 39].

The jurisdiction of the District Court was based on Title 26, U. S. C. §4705(a), Title 18, U. S. C. §3231, and Rule 18, Federal Rules of Criminal Procedure.

II

APPLICABLE STATUTES AND REGULATIONS

A.

Title 50 App., Section 462, United States Code, provides in part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or

neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both

"Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the Local Board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the Local Board designated for the purpose if he filed a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended. "

B.

32 C. F. R. 1626.2(a) provides in pertinent part:

"The registrant . . . may appeal to an appeal board from the classification of a registrant by

the local board. "

C.

32 C. F. R. 1626. 2(c) provides in pertinent part:

"The registrant . . . may take an appeal authorized under paragraph (a) of this section at any time within the following periods:

"(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110). "

D.

32 C. F. R. 1626. 11(a) provides in pertinent part:

"Any person entitled to do so may appeal to the appeal board by filing with the Local Board a written notice of appeal. . . . "

E.

32 C. F. R. 1641. 2(b) provides in pertinent part:

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege. "

F.

32 C. F. R. 1625. 2 provides in pertinent part as follows:

"The Local Board may reopen and consider anew the classification of a registrant . . . provided, . . . the classification of a registrant shall not be reopened after the Local Board has mailed to such

registrant an order to report for induction (SSS Form No. 252) . . . unless the Local Board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control. "

G.

32 C. F. R. 1625.4 provides in pertinent part:

"When a registrant . . . files with the Local Board a written request to reopen and consider anew the registrant's classification and the Local Board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification,"

H.

32 C. F. R. 1642.2 provides in pertinent part:

"When it becomes the duty of a registrant . . . to perform an act or furnish information to a Local Board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the

supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty. "

III

STATEMENT OF FACTS

At the time of the trial of this case, a photographic copy of the official Selective Service System file of this appellant was offered and admitted into evidence as Government's Exhibit No. 1 [R. T. 11]. 2/

This file revealed the following facts with respect to appellant's registration status in the Selective Service System.

On May 22, 1956, the defendant registered with Local Board No. 118, in Gardena, California (pp. 1 and 2). 3/ On June 10, 1957, the Board received a Classification Questionnaire (SSS Form 100), in which no claim as a conscientious objector was made (pp. 5-11 at p. 12, Series XV). On June 3, 1959, by a vote of 3-0 the defendant was placed in Class I-A (p. 12), and notice of said classification was mailed to the defendant (SSS Form 110), (p. 12).

On October 28, 1959, the Board received an Undergraduate College Student Certificate (SSS Form 109), indicating defendant

2/ "R. T. " refers to Reporter's Transcript of Record.

3/ Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

MEMORANDUM

TO : THE CHAIRMAN, DIVISION OF THE PHYSICAL SCIENCES
FROM : [Name], [Title]
SUBJECT: [Topic]

[Main body of the memorandum containing several paragraphs of text, which is extremely faint and illegible in this scan.]

Very truly yours,
[Signature]
[Name]
[Title]

was a student at the University of California and achieved a scholastic standing within the upper one-quarter of his class (p. 16). On November 4, 1959, the Board by a vote of 3-0 placed the defendant in Class II-S, student deferment until June, 1960, and a notice of such classification was mailed to the defendant (p. 12). Between September, 1960, and June, 1964, the defendant attended and graduated from the University of California School of Medicine during which time defendant remained classified II-S, student deferment (pp. 12 and 20-31).

On August 14, 1964, the Board received a completed Current Information Questionnaire (SSS Form 127) (pp. 32 and 33). On August 20, 1964, defendant was ordered for an armed forces physical examination on September 30, 1964 (p. 36). On August 28, 1964, the Board received a letter from the University of Kansas Medical Center indicating the defendant had commenced his internship on July 1, 1964 (p. 38). On September 9, 1964, the Board by a vote of 2-0 placed the defendant in Class 2-A, occupational deferment, until July, 1965 (p. 12). Notice of said classification was mailed to the defendant (p. 12).

On October 12, 1964, and again on October 28, 1964, defendant was ordered for an armed forces physical examination (pp. 41 and 42). On January 6, 1965, the Board by a vote of 2-0, placed the defendant in Class I-A (p. 12). On March 9, 1965, the Board received a letter from the defendant asking why his classification had been changed from II-A, Occupation Deferment to I-A, Available for Service. The defendant also inquired whether

his name had been selected for the April draft of physicians (p. 43). On March 10, 1965, the Board wrote the defendant indicating the change in his classification was due to the need for doctors in the armed forces, and that he would be allowed to complete his internship (p. 45). On March 29, 1965, defendant was found acceptable for induction into the armed forces (DD Form 62) (p. 48). On April 13, 1965, the defendant was ordered for induction on July 1, 1965 (p. 50). On April 13, 1965, the date defendant's induction order was mailed he wrote the Board asking about his draft status (p. 54). On April 20, 1965, the Board in answer to defendant's letter affirmed that he had been ordered for induction on July 1, 1965 (p. 56).

On April 26, 1965, the Board received a letter from the United States Public Health Service that the defendant had applied for a commission in that service and requested a statement as to his induction status (p. 57). On April 26, 1965, the Board wrote the United States Public Health Service that the defendant had been ordered for induction on July 1, 1965 (p. 58). On April 26, 1965, Dr. B. M. Kagan wrote the Board that the defendant had been accepted as a resident in pediatrics and requested that he be deferred (pp. 59 and 60). On April 29, 1965, the Board was notified by the State Director of Selective Service to cancel defendant's order for induction as a result of his residency training (p. 62). On April 29, 1965, defendant was notified of this cancellation (p. 63). On August 26, 1965, prior to the cancellation of his order for induction defendant had been allocated for service

to the U. S. Navy (p. 65). On April 28, 1965, the United States Public Health Service wrote the defendant indicating he must be accepted to their service before the date of his original order of induction (p. 67). On April 29, 1965, the U. S. Navy wrote defendant concerning application for a commission (p. 69). On August 4, 1965, by a vote of 2-0, the Board placed defendant in Class II-A, Occupational Deferment until August, 1966 (p. 13).

On October 7, 1965, defendant's file was forwarded to Selective Service Headquarters (p. 11), and returned to the Board on October 21, 1965 (p. 11), with the recommendation that defendant be classified under the provisions of Operations Bulletin No. 280 (p. 80). On October 7, 1965, defendant was ordered for the armed forces physical examination on October 28, 1965. On October 28, 1965, the defendant failed to report for his physical examination and on October 29, 1965, wrote the Board his failure to appear was a result of a conflict in his work schedule (p. 81). On November 3, 1965, the defendant was again ordered for a physical examination on November 19, 1965 (p. 84). On November 29, 1965, the Board received a letter from Dr. B. M. Kagan requesting that the defendant be deferred so that he could complete his residency training to July 1, 1967 (p. 86).

On January 24, 1966, the Board by a vote of 2-0 placed the defendant in Class I-A (p. 13). A notice of said classification was mailed to the defendant (p. 13). On January 25, 1966, a statement of acceptability for service was mailed the defendant (p. 89). On January 31, 1966, the Board received a letter from

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF THE HISTORY OF ARTS

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the defendant appealing his I-A classification (p. 90). On January 31, 1966, defendant's file was forwarded to the Appeal Board and on February 24, 1966, by a vote of 3-0 defendant was classified in Class I-A (p. 4). A notice of said classification was mailed defendant on that date (p. 13). On February 28, 1966, defendant was ordered for induction on March 15, 1966 (p. 94).

On the same date that the order of defendant's induction was mailed to him February 28, 1966, the Board received a letter from defendant claiming status as a conscientious objector and requesting the necessary forms (p. 98), which were mailed to defendant on March 2, 1966 (p. 13). On March 7, 1966, the Board received a letter from the defendant stating his induction should be cancelled while his request for a I-O classification is processed.

On March 8, 1966, the Board received the defendant's completed Special Form for Conscientious Objector (SSS Form 150), in which the defendant stated in substance as follows: that his beliefs are based on his "Jewish upbringing and religious training", his training as a physician, his respect for life, the principle derived from the Nuremberg trial "that the individual alone is responsible for his actions no matter from where he is ordered" (page 105).

In answer to Series 4, requesting the name and present address of the individual upon whom he relies most for religious guidance, the defendant answered "myself" (p. 106). In response to Series 6, requesting the action and behavior in his life that most conspicuously demonstrates the consistency and depth of his

religious convictions, the defendant answered: "Participation in demonstrations against the war in Vietnam both in Los Angeles and in Berkeley, California (p. 106).

Finally, the defendant stated:

"It is my sincere and true belief that the war the United States Armed Forces are fighting in Vietnam is unjust and that even an order of my country to participate in any form would not relieve me of my conscientious responsibility for such an immoral and unreligious act." (p. 105)

On March 10, 1966, the following entry appears in the Selective Service file: "Board members contacted, file reviewed, new information does not warrant reopening of classification. Must report for Induction as ordered." This entry is followed by a vote of 3 to 0. Notice of the board's decision was mailed to the defendant on March 11, 1966 (p. 110).

On March 14, 1966, defendant called the board and indicated that he had contacted National Headquarters and wished to know if the board had received any information (p. 112).

On March 15, 1966, the defendant reported to the induction station and thereafter refused induction into the armed forces as ordered (pp. 113-115).

IV

QUESTIONS PRESENTED

1. THE SUBMISSION BY THE APPELLANT OF A LATE CONSCIENTIOUS OBJECTOR CLAIM WITH NO FACTS SHOWING A CHANGE OF STATUS OVER WHICH HE HAD NO CONTROL PRECLUDED THE LOCAL BOARD FROM REOPENING HIS CASE.
2. THE INDUCTION NOTICE WAS TIMELY MAILED AS NO FURTHER RIGHT TO APPEAL EXISTED FOR THE APPELLANT.

V

THE SUBMISSION BY THE APPELLANT OF A LATE CONSCIENTIOUS OBJECTOR CLAIM WITH NO FACTS SHOWING A CHANGE OF STATUS OVER WHICH HE HAD NO CONTROL PRECLUDED THE LOCAL BOARD FROM REOPENING HIS CASE.

The Selective Service file of the appellant, introduced into evidence as Government's Exhibit No. 1, indicates several key dates which are crucial to a proper determination of this case. On February 28, 1966, two events occurred: First, an order for induction was mailed, the induction date being March 15, 1966. Second, the local board received a letter in which appellant claimed to be a conscientious objector and also requested he be sent a

THE HISTORY OF THE CITY OF BOSTON

The city of Boston, situated on a neck of land between the harbor and the bay, has been the seat of government and commerce for more than two centuries. It was first settled by Englishmen in 1630, and has since that time been the center of the New England colonies. The city has grown from a small fishing village to a great metropolis, and has played a prominent part in the history of the United States. It was the first city to declare its independence from Great Britain, and it was the first to establish a free press. It was the first to adopt a constitution, and it was the first to hold a convention. It was the first to elect a mayor, and it was the first to hold a city council. It was the first to establish a public school, and it was the first to hold a city court. It was the first to hold a city election, and it was the first to hold a city festival. It was the first to hold a city fair, and it was the first to hold a city race. It was the first to hold a city show, and it was the first to hold a city exhibition. It was the first to hold a city concert, and it was the first to hold a city opera. It was the first to hold a city play, and it was the first to hold a city dance. It was the first to hold a city ball, and it was the first to hold a city party. It was the first to hold a city wedding, and it was the first to hold a city funeral. It was the first to hold a city ceremony, and it was the first to hold a city celebration. It was the first to hold a city festival, and it was the first to hold a city fair. It was the first to hold a city show, and it was the first to hold a city exhibition. It was the first to hold a city concert, and it was the first to hold a city opera. It was the first to hold a city play, and it was the first to hold a city dance. It was the first to hold a city ball, and it was the first to hold a city party. It was the first to hold a city wedding, and it was the first to hold a city funeral. It was the first to hold a city ceremony, and it was the first to hold a city celebration.

The city of Boston has a rich and varied history, and it has played a prominent part in the history of the United States. It was the first city to declare its independence from Great Britain, and it was the first to establish a free press. It was the first to adopt a constitution, and it was the first to hold a convention. It was the first to elect a mayor, and it was the first to hold a city council. It was the first to establish a public school, and it was the first to hold a city court. It was the first to hold a city election, and it was the first to hold a city festival. It was the first to hold a city fair, and it was the first to hold a city race. It was the first to hold a city show, and it was the first to hold a city exhibition. It was the first to hold a city concert, and it was the first to hold a city opera. It was the first to hold a city play, and it was the first to hold a city dance. It was the first to hold a city ball, and it was the first to hold a city party. It was the first to hold a city wedding, and it was the first to hold a city funeral. It was the first to hold a city ceremony, and it was the first to hold a city celebration.

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Form SSS No. 150, Special Form for Conscientious Objectors (page 98 of Government's Exhibit No. 1). On March 8, 1966, one week before the scheduled induction date, the appellant submitted a completed Form SSS 150. On March 15, 1966, the appellant refused induction.

The governing regulation in this case is 32 C. F. R. 1625.2, which provides a pertinent part as follows:

"The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when a registrant was classified which, if true, would justify a change in the registrant's classification; . . . provided the classification . . . of a registrant shall not be reopened after the local board has mailed to such registrant an order to report for induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (emphasis added)

It is clear, therefore, from a reading of the last clause of the regulation that before a reopening would be permissible, it would be mandatory for the board to find that a change of status had occurred beyond the control of the registrant.

Considering first the letter of February 28, 1968, no facts whatsoever were presented by the appellant upon which the board could have made such a determination. That letter merely claimed the status of conscientious objector and in addition requested an SSS 150 form. Viewing the letter only as what the board had before it, it is clear that " . . . there was nothing to show that there was a change of status to be considered".

United States v. Dugdale, 384 F.2d 482, 485

(9 Cir. 1968).

Turning next to the form submitted by the appellant on March 8, 1966, there can be no dispute whatsoever that this is an untimely, or late, conscientious objector claim. The application of the pertinent provision of 32 C.F.R. 1625.2, is without doubt.

The appellant, however, chose in his brief virtually to ignore the regulation which governs this case. Rather, appellant views the brief letter that arrived the same date as the mailing of the induction notice, and the SSS Form 150 which arrived over a week after the notice was mailed, as somehow timely. In his quotation of 32 C.F.R. 1625.2, found on page 15 of Appellant's Brief, he presents the "relevant part" and thereby completely omits the proviso governing the late claim. Concluding that it is therefore a timely claim, appellant then, in part two of his brief beginning at page 20, commences to make out a standard argument that would be applicable if appellant's were a timely claim. Even if the argument is valid, it has no relevance whatsoever to a late claim situation as in the present case.

Appellant makes brief mention only of the fact that this case at bar might include the issue of a late claim. On page 20 of his brief, appellant there concedes that 32 C.F.R. 1625.2 contains the additional proviso concerning a late claim. But, concludes the appellant, "that proviso is not pertinent here . . ." (Appellant's Brief, p. 20). His reasoning is " . . . because the local board, by placing its refusal to re-open on the sole ground that the 'new information does not warrant reopening of classification' . . . appears thereby to have treated appellant's claim as an application filed prior to the mailing of his induction notice." (Appellant's Brief, p. 20).

The Selective Service file and the transcript of trial reflects nothing to indicate that the board treated appellant's claim arriving over a week after the induction notice was mailed, as "timely". In fact, the appellant himself at the trial introduced a letter in which he himself stated that he phoned the board and "I was told that since I had requested SSS -- 150 form and C.O. status after induction orders had been mailed I am not subject to the usual processing of C.O." [R. T. p. 54].

Furthermore, appellant completely ignores the mandatory language of the regulation. After the Notice of Order for Induction (SSS Form No. 252), is mailed to the registrant, the Local Board has no authority but rather is forbidden to reopen registrant's classification unless it specifically finds a change in the registrant's status resulting from circumstances over which registrant had no control. 32 C.F.R. 1625.2.

Boyd v. United States, 269 F.2d 607, 609-10

(9 Cir. 1955);

Feuer v. United States, 208 F.2d 719

(9 Cir. 1953);

Miller v. United States, 388 F.2d 973

(9 Cir. 1967);

Keene v. United States, 266 F.2d 378, 383

(10 Cir. 1959).

The circumstances relied upon to show a change must have occurred after the induction notice was mailed.

Keene v. United States, supra, at 384;

United States v. Bonga, 201 F. Supp. 908

(D. Mich. 1962).

Since the applicable regulation is the late claim provisions of 32 C.F.R. 1625.2, it was incumbent upon the appellant " . . . to submit statements and information which, if true, would be a basis for the change in classification. He was required to show a 'change of status' occurring after receipt of the induction notice. "

United States v. Dugdale, supra, p. 484.

On his form for conscientious objectors, SSS Form 150, the appellant indicated his views were acquired through his Jewish upbringing and training, his education as a physician and the learned principles of the Nueremberg trial.

In United States v. Dugdale, the appellant there had acquired his views " . . . through his home life, his contacts with acquaintances and friends, and his reading of literature. " United States v.

Dugdale, supra, p. 484. There, this Court pointed out the crucial requirement under the governing regulation: " . . . None of his reasons are consistent with any claim that his views matured or changed after receipt of the induction notice." United States v. Dugdale, supra, p. 484.

That conclusion is equally applicable to the instant case, wherein none of the facts whatsoever submitted by appellant indicate any change of views after receipt of the induction notice.

Furthermore, appellant indicated that he had shown his views through demonstrations in Los Angeles and Berkeley. This fact leads to the inescapable conclusion that any conscientious objector beliefs that appellant may have had indeed came to fruition and existed in a period considerably before the mailing of the induction notice.

It is clear, therefore, that the board in considering the SSS Form 150, had no facts whatsoever before it by which it could make a finding that there was a change in the registrant's status resulting from circumstances beyond his control occurring after mailing of the induction notice.

United States v. Dugdale, supra, at 485;

See also United States v. Briggs, No. 21363

(9 Cir., June 26, 1968).

The record of trial reflects that the meeting of the board on March 10 was held when the clerk, Mrs. Mary L. Armand, contacted two members of the local board by telephone, and that an actual face to face meeting did not take place [R. T. 19].

Appellant cites certain operational memorandum of the Selective Service System dated October 18, 1967 and June 10, 1968, as standing for the proposition that telephonic decisions do not comply with the Selective Service regulations [Appellant's Brief, p. 18]. Appellant, however, does not and cannot contend that these regulations -- the only ones cited -- somehow apply to a fact situation in 1966.

Nevertheless, even if in 1966 such a telephonic meeting were improper, the controlling question that must be asked is this, what possible prejudice has inured to the appellant by virtue of this procedure?

It is well settled that procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded. Yaich v. United States, 283 F.2d 613 at 620 (9 Cir. 1960), and cases cited therein.

In the instant case, no prejudice has resulted and none has been proffered to exist. Only a strained construction of the section would require that the members of the local Board be present together to consider information which conclusively on its face would not allow a reopening of the defendant's classification.

In United States v. Porter, the court was faced with a similar situation. An induction order was mailed on August 1, 1960, the reporting date was August 9, 1960, and on August 8, 1960, the appellant requested a conscientious objector form and stated that he was a conscientious objector. Petitioner was indicted under Title 50 App.

U. S. C. §462(a), tried and convicted. That conviction was affirmed on appeal. United States v. Porter, 314 F.2d 833 (7 Cir. 1963).

Petitioner subsequently filed a motion to vacate his sentence under Title 28, U. S. C. §2255, on the ground that, unknown to him earlier, the Local Board had never convened to consider the additional data he filed concerning his religious convictions or also his change in marital status. Petitioner appealed from denial of his motion in the U. S. District Court. The court held as follows:

"After careful study of the record, we are constrained to conclude that the evidence submitted by the petitioner was legally insufficient to cause re-opening of his classification. Any procedural irregularity which may have occurred here did not result in prejudice to petitioner and thus did not attain to the gravity of a denial of due process."

Martin v. United States, 190 F.2d 775, 779
(4 Cir. 1951).

United States v. Porter, 334 F.2d 792
(5 Cir. 1963).

Furthermore, the practical implication of holding that the board must specially meet any time new information is provided, or cancel the induction order, " . . . would work havoc upon the Selective Service System and manpower quotas could rarely be met with any reasonable degree of certainty." United States v. Geary, 379 F.2d 915, 918 (2 Cir. 1967). See Keene v. United

States, 266 F.2d 378, 383-84 (10 Cir. 1959).

It is, therefore, apparent that the appellant filed a late conscientious objector claim, that under the applicable regulation the board must make a finding of a change in circumstances beyond the registrant's control occurring after the notice for induction is mailed, that no facts whatsoever were submitted by appellant either by his letter or by the conscientious objector form, and that regardless of the propriety of the telephone local board meeting, no possible prejudice inures to the defendant since even had the board met in proper session, there would have been no facts whatsoever before it to allow a finding of a change in circumstances occurring after notice for induction was mailed.

VI

THE INDUCTION NOTICE WAS TIMELY MAILED
AS NO FURTHER RIGHT TO APPEAL EXISTED
FOR THE APPELLANT.

Appellant contends as follows: "The induction notice was invalid and void because mailed before the expiration of appellant's time for appeal had expired. "

Appellant further cites the provisions of 32 C.F.R. 1626.41, which provides as follows:

"The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the appeal board or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the local board. Whenever an appeal to the appeal board has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board. "

The facts in the instant case, however, clearly indicate that this regulation is inapplicable. The Selective Service file reflects that on January 24, 1966, the appellant was classified in Class I-A; that on January 31, 1966, the board received the

appellant's letter of appeal; that on the same date, January 31, the board forwarded the file to the Appeal Board, and that on February 25, 1966, the file was returned from the Appeal Board with the appellant classified I-A by a 3-0 vote [Government's Ex. 1, p. 13].

As can be seen from the above facts, the appellant had in fact appealed and the decision of the Appeal Board had been returned to the local board, after which a notice for induction was mailed. The appellant had no further right of appeal, since the Appeal Board decision was unanimous, and only if the Appeal Board decision involved a dissent would an appeal lie to the President [32 C. F. R. 1627. 3].

Appellant on pages 27 and 28 of his Brief, cites 32 C. F. R. 1626. 61(b) as controlling. That regulation provides as follows:

"At any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (SSS Form No. 110) . . . or at any time before the registrant is mailed an Order to Report for Induction (SSS Form No. 252), the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the appeal board to reconsider its determination or appeal to the President. The registrant's file shall then be

forwarded to the State Director of Selective Service "

Appellant then contends that:

" . . . the record fails to show that the Local Board advised appellant that an appeals agent might, in an appropriate case, seek reconsideration of his appeal under Selective Service Regulations §1626.61(b). Since this was obviously an important and substantial right, the Board's omission deprived the appellant of due process of law." [Appellant's Br., p. 31].

For this proposition, appellant cites two cases: United States v. Giessel, D.C.N.J., 1955, 129 F.Supp. 223; and United States v. Sobczak, D.C.Ga., 1966, 264 F.Supp. 752.

The Giessel case in no way refers to the proposition for which it is cited. That case refers solely to a situation regarding a right to consult with a Selective Service advisor, pursuant to the appeal rights provided in 32 C.F.R. 1626.41. As indicated above, the appellant had already availed himself of said right to appeal.

Furthermore, the Sobczak case is also not in point in that it involved a registrant who, after requesting a conscientious objector form, was not supplied one by his local board. In addition, that board did not inform him of any right to a hearing in connection with a conscientious objector claim. This case in no way makes reference to the provisions of 1626.61(b), which simply do not

contain any "substantial rights" of the appellant about which he must be advised.

Appellant further contends that " . . . by mailing the induction notice prematurely, and by failing to advise appellant of his rights under Selective Service Regulations §1626.61(b), the Local Board deprived appellant of the opportunity and possibility of securing a change in his classification through an appeal agent, and thereby vitiated its induction order. " [Appellant's Br. p. 32].

For this proposition appellant cites the case of United States v. Stepler, C.A. 3rd, 1958, 258 F.2d 310, 315. That case has no application whatsoever to the issues of this appeal. In Stepler a local board had erroneously denied the registrant a ministerial classification and the State Director had suggested this error to the local board in that it had denied classification on a basis not in accord with the applicable regulations. The local board refused to reopen and reconsider the classification and this the Court of Appeals for the Third Circuit held as error since this refusal cut off the appeal rights of the registrant. No such issue whatsoever exists in the instant case wherein appellant had already exercised his right to appeal his I-A classification.

Lastly, appellant contends that " . . . appellant's time for appeal under Selective Service Regulations §1626.61(b) had clearly not yet expired when the Board mailed his induction notice. Therefore, by virtue of Regulation §1626.41, the Board's induction order, mailed only three days after the mailing of appellant's Notice of Classification (Form 110), was 'ineffective and void. '"

For this proposition appellant cites two cases: United States v. Hertlein, D. C. Wisc., 1956, 143 F. Supp. 742, 745-746, and Striker v. Resor, supra, 283 F. Supp. 923 (D. C. N. J. 1968).

The only issue in the Hertlein case which might possibly have any bearing on the case at bar is this -- whether, after a registrant has filed an appeal, the local board may reopen his classification and reclassify him, thus cutting off the registrant's original appeal and forcing the registrant to appeal from the new classification. The Court held the Board could not.

It is clear that since the appellant had already taken his appeal pursuant to the applicable regulations, this issue as decided in Hertlein has no relevance to the instant case.

Striker v. Resor was a habeas corpus application which was concerned with the rights to appeal as provided for in 32 C. F. R. 1626.41. There the court held that it was incumbent upon the board to advise the registrant of his rights under that section, but failed to do so.

As indicated above, this issue has no relevance to the instant case wherein appellant has already exercised his right of appeal and where no further right to appeal existed.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

ERIC A. NOBLES
Assistant U. S. Attorney

Attorneys for Appellee
United States of America.

N O. 2 2 7 2 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

ERIC A. NOBLES
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2475 or 688-2434

FILED

OCT 10 1968

WM. B. LUCK, CLERK

Attorneys for Appellee,
United States of America

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IN THE UNITED STATES COURT OF APPEALS
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Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
688-2475 or 688-2434

Attorneys for Appellee,
United States of America



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N O. 2 2 7 2 7
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF

I

LOCAL BOARD MEMORANDUM NO. 72 IS
INAPPLICABLE TO THE INSTANT CASE

The appellant in his reply brief has for the first time offered authority designed to escape the mandatory late claim provisions of 32 C.F.R. §1625.2.

In so doing, he argues the applicability in the instant case of Local Board Memorandum No. 72, issued by the Director of Selective Service on December 17, 1962. That memorandum reads as follows:

"SUBJECT: TIMELY FILING OR SUBMISSION OF
NOTICES OR INFORMATION.

"1. Selective Service Regulations provide that a registrant and other specified persons, to be entitled to a procedural right or to qualify for a status, must file with or submit to the local board a notice or information within a specified period of time or before a 'cut-off' date.

"2. When such a notice or information is filed with or submitted to the local board by mail, the date or mailing as shown by the postmark on the envelope and not the date it was received by the local board shall be used in determining whether the filing or submission is timely.

"3. The envelope in which any such notice or information is received shall be placed in the registrant's cover sheet attached to the contents of the envelope."

Appellant then reasons as follows:

"Appellant's claim was supposed to be filed within ten days after his change of status occurred (SSR §1625.1(b)). Therefore, appellant's letter of February 26 was one of those embraced by Local Board Memorandum No. 72; and, though actually received by the Board on February 28, should have been deemed received on the preceding day."

(Appellant's Reply Brief, p. 5)

The instructions and memorandums of the Director of Selective Service are generally considered not to be mandatory but advisory only.

Sterrett v. United States, 216 F.2d 659

(9th Cir. 1954);

United States ex rel. Lawrence v. Commanding

Officer, Neb., 58 F.Supp. 933 (1945);

Ex parte Stewart, S.D. Calif., 47 F.Supp. 415

(1942);

Goodwin v. Rowe, N.D. W.Va., 49 F.Supp. 703

(1943).

Nevertheless they are clearly issued in order to amplify or clarify certain regulations which themselves do have the force of law.

Arver v. United States, 245 U.S. 366 (1918);

Singer v. United States, 323 U.S. 338, 65 S.Ct.

282;

DeMoss v. United States, 218 F.2d 119 (8th Cir.

1954), rev'd. other grounds, 349 U.S. 918,

75 S.Ct. 659;

Young v. Terminal R.R. Ass'n. of St. Louis,

70 F.Supp. 106, (E.D. Mo. 1947).

The issue presented then is this: whether LBM No. 72 is by its terms designed to modify and affect the explicit provisions of the governing regulation, 32 C.F.R. §1625.2. It is submitted that a reading of the local board memorandum, along with the

regulations to which it obviously has application, can lead to no other conclusion than that the memorandum is not applicable to the instant case and hence does not affect the late claim provisions of 32 C.F.R. §1625.2

Considering first the applicable regulation, it provides in pertinent part as follows:

"The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when a registrant was classified which, if true, would justify a change in the registrant's classification; . . . provided the classification . . . of a registrant shall not be reopened after the local board has mailed to such registrant an order to report for induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (emphasis added) 32 C.F.R. §1625.2

In comparing this regulation with LBM No. 72, one item is noteworthy: in citing LBM No. 72 in his brief, the appellant chose to take the material out of context. He completely ignored and did not include what would appear to be highly relevant: the various Selective Service regulations to which this memorandum

has application. At the upper righthand corner of the printed memorandum are the words "SSS Reg. " Beneath that is found the four regulations to which the memorandum clearly applies. They are Regulations 1624.1, 1626.2, 1627.3 and 1641.6.

The importance of the regulations listed is that they provide a clear guide line as to the intent in application of the memorandum.

SSS Regulation 1641.6 is one of the regulations mentioned in the local board memorandum. It provides as follows:

"The period of days allowed a registrant or other person to perform any act or duty required of him shall be counted as beginning on the day following that on which the notice to him is posted or mailed."

This regulation governs the time when the period begins to run in situations where a registrant must perform an act or duty within a specified period of time. That time is the date following that on which the notice is mailed.

It is clear, therefore, that LBM No. 72 was issued for one principal purpose: in order to permit a registrant to have the full period allowed to him under the regulations to submit information to a local board. The date of postmark, and not the date of receipt by the local board, is to be controlling.

The situation therefore to which LBM No. 72 relates is solely that wherein a registrant is required to submit facts or information to the local board within a specified period of time.

The only instances where the rule applies is where the Selective Service regulation provides that ". . . a notice or information" must be filed ". . . within a specified period of time or before a 'cut-off' date" in order ". . . to be entitled to a procedural . . . or to qualify for a status." Thus a reading of LBM No. 72, along with SSS Regulation 1641.6, clearly suggests its applicability only to this type of situation.

Furthermore, a reading of the three other Selective Service regulations mentioned in LBM No. 72, leads to the same conclusion. All three are of a type involving a specified period of time in which a registrant must file notice or information to a local board.

SSS Regulation 1624.1 relates to the right of registrant to appear before his local board. That regulation provides in pertinent part as follows:

"(a) Every registrant after his classification is determined by the local board, except a classification which is determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 30 days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such 30-day period may not be extended. "

This is obviously a specified period of time in which a registrant is to perform an act in order to obtain a procedural right. Hence LBM No. 72 is clearly applicable.

Another Selective Service regulation cited in LBM No. 72, is SSS 1626.2. That regulation provides in pertinent part that a ". . . registrant . . . may take an appeal . . . within 30 days after the date the local board mails to the registrant a Notice of Classification, (SSS Form 110)." This 30-day limitation is clearly a time period within which the registrant is required to file an appeal in order to be entitled to a procedural right. Again LBM No. 72 would be applicable to this situation.

The other regulation mentioned in LBM No. 72, is SSS Regulation 1627.3. That regulation governs the right to appeal to the President of the United States when an appeal board determination is not unanimous. That regulation is as follows:

"When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, the registrant, any person who claims to be a dependent of the registrant, or any persons who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant may appeal to the President within 30 days after the mailing by the local board of the Notice of Classification (SSS Form 110) notifying the registrant of this classification by the

appeal board. . . . "

This is clearly the kind of regulation in which the post-mark rule would be applicable.

These kinds of regulations to which LBM No. 72 applies, however, must be contrasted with the explicit provisions of 32 C.F.R. §1625.2. That section in no way relates to a prospective date situation by which a registrant is required to submit notice or information in order to be entitled to a right of status. Rather, it is an administrative directive that after a time, namely, after a notice to report for induction is mailed, a specific determination must be made by the local board before it will be permitted to reopen.

Appellant attempts to come within the provisions of the local board memorandum in another way, that is, by arguing the application of 32 C.F.R. §1625.1(b). Appellant states that his ". . . claim was supposed to be filed within ten days after his change of status occurred . . ." (Appellant's Reply Brief, p. 5)

32 C.F.R. §1621.1(b) provides as follows:

"Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification, such as, but not limited

to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof. "

That provision, however, in no way is applicable to the facts of the instant case for one apparent reason: the evidence is totally devoid of any facts whatsoever to indicate that the change of status to a conscientious objector occurred within ten days prior to the mailing of the order to report for induction. To the contrary, the SSS Form 150 filed by appellant quite clearly reflected that any conscientious objector beliefs that the appellant may have had, occurred considerably before the notice to report for induction was mailed. [p. 105, SSS Selective Service File; Government's Ex. No. 1.]

CONCLUSION

The provisions of LBM No. 72 are applicable to certain very limited and explicit Selective Service Regulations. These regulations are listed in the LBM itself and are of a kind involving a specific period of time for a registrant to file information with his local board. The LBM makes no mention whatsoever of SSS Regulation 1625.2, which is the governing regulation in this case. Furthermore, in addition to not being mentioned in the local board memorandum, SSS Regulation 1625.2 is clearly not

that kind of prospective regulation as the others listed.

Since the date of postmark rule of LBM No. 72 does not apply to the instant case, the late claim provisions of SSS Regulation 1625.2 are controlling. As the appellant's late conscientious objector claim contained no facts whatsoever indicating that his change of status occurred after the mailing of the notice for induction, and regardless of the propriety of the telephonic board meeting, the defendant was in no way prejudiced, since no facts whatsoever were presented by him to the board to have permitted their finding of a change in status occurring after the notice for induction was mailed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

ERIC A. NOBLES
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America

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Attorney for Appellant

Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,)
)
Appellant,)
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vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
)
)

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HON. FRANCIS C. WHELAN, PRESIDING

DAVID B. FINKEL
3440 Wilshire Blvd., Suite 608
Los Angeles, California 90005

Attorney for Appellant

HUGH R. MANES
3440 Wilshire Blvd., Suite 608
Los Angeles, California 90005

Of Counsel

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§ 1604.1(a) and (b)

4

§ 1606.51

4

§ 1621.11

7

§ 1625.1(b)

5

§ 1625.2

6

§ 1625.2(b)

4

Local Board Memorandum 41

6

Local Board Memorandum 72

5

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRACHI,)
)
Appellant,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
)

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

At the outset, Appellant invites the Court's attention to the fact that his Motion to Remand for further evidence (App. Br. pp. 12-13) is not opposed by the Government's brief.

See: Stafford v. United States, 2d Cir., 1968, 289 F2d 215, where Court remanded case to trial judge "to ascertain if the Local Board determined that appellant's claim had matured before the induction notice was sent...." (p. 219)

By extracting appellant's statements out of context, the Government seeks to convey the impression that appellant's beliefs are personal or political.

1 Read as a whole, appellant's claim is primarily, if
2 not exclusively, based on his religious training and beliefs.
3 And that is all that is required.

4 Fleming v. United States, CA 10th, 1965,
5 344 F.2d 912, 916

6 The Government contends that appellant's participation
7 in anti-war demonstrations conclusively shows that his conscien-
8 tious objection beliefs preceded his induction notice, thereby
9 barring his claim from consideration (Gov't. Br. p.17)

10 The point is irrelevant because, as we shall see
11 momentarily, appellant's claim preceded the mailing of his
12 induction notice by one day.

13 However, even if relevant, participation in anti-war
14 demonstrations does not establish the maturation date of bona
15 fide conscientious objection to all wars.

16 But the principal issue here is whether appellant's
17 claim preceded his induction notice. So we move on to that
18 question.

19 /

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1 POINT I

2 APPELLANT'S CLAIM TO CONSCIENTIOUS
3 OBJECTOR STATUS PRECEDED THE MAILING
4 OF HIS INDUCTION NOTICE. AND THERE-
5 FORE THE LOCAL BOARD'S TELEPHONIC
6 REJECTION OF HIS CLAIM WAS ILLEGAL
7 AND PREJUDICIAL.

8 The Government contends that appellant's letter of
9 February 26 presented "no facts whatever" indicating that a
10 change of status had occurred beyond appellant's control, and
11 hence, the Local Board was powerless to reopen. (Gov't Br.pp.13-14)

12 The record fails to support the Government's thesis.
13 The Board itself noted on the cover sheet that appellant's
14 claim presented "new information," even if deemed insufficient
15 to warrant reopening (Ex. A, p.11).

16 Moreover, appellant's February 26 letter stated:

17 "I wish to claim status as a conscientious
18 objector and be classified as 1-0.

19 "Please send me application forms SSS 150."

20 That letter obviously presented a new fact, namely,
21 that appellant had become a conscientious objector.

22 Besides, the maturity of conscientious scruples against
23 war, even if belated, is clearly a circumstance over which a
24 registrant has no control. As this Court observed in Ehlert v.
25 United States, 9th Cir. #21930, decided September 11, 1968:
26 /

1 "We here hold that the dictates of a registrant's
2 conscience can constitute a circumstance beyond
3 his control. Conscientious objection itself
4 would seem to be a contradiction of control."

5 To the same effect is United States v. Gearey, 2d
6 Cir., 1966, 368 F.2d 144, 150.

7 However, it was unnecessary for the Local Board to
8 make the finding prescribed for late claims by SSR § 1625.2(b)
9 because appellant's claim was - or should have been - deemed
10 filed on February 27, the day before the induction notice was
11 mailed.

12 Under this view, appellant's form 150, filed on March
13 8, was merely supplementary to appellant's claim; and the Local
14 Board was therefore under a duty to reopen appellant's classifi-
15 cation.

16 The envelope containing appellant's said letter of
17 February 26 bears a postal mark of February 27 (Ex. A, p.96-97).

18 SSR § 1604.1(a) and (b) authorizes the Selective
19 Service Director to prescribe "such rules and regulations as he
20 shall deem necessary for the administration of the Selective
21 Service System" and "to issue such public notices, orders and
22 instructions as shall be necessary for carrying out the func-
23 tions of the Selective Service System."

24 The Director is also empowered by SSR § 1606.51 to
25 revise and prescribe Selective Service forms, which revisions
26 thereby "become a part of the Selective Service regulations..."

1 Pursuant to the foregoing authority, the Director
2 issued Local Board Memorandum No.72 on December 17, 1962, which
3 was - and still is - in effect at all times relevant hereto.
4 That order provides, in pertinent part, as follows:

5 "1. Selective Service Regulations provide
6 that a registrant, to be entitled to a
7 procedural right or to qualify for a
8 status, must file with or submit to the
9 Local Board a notice or information within
10 a specified period of time or before a
11 'cut-off' date.

12 "2. When such a notice or information is
13 filed with or submitted to the Local Board
14 by mail, the date of mailing as shown
15 by the postmark on the envelope and not
16 the date it was received by the Local
17 Board shall be used in determining whether
18 the filing or submission is timely.

19 * * * * *

20 (emphasis supplied)

21 Appellant's claim was supposed to be filed within ten
22 days after his change of status occurred (SSR § 1625.1(b)).
23 Therefore, appellant's letter of February 26 was one of those
24 embraced by Local Board Memorandum No.72; and, though actually
25 received by the Board on February 28, should have been deemed
26 received on the preceding day.

1 In further support of this view, reference is made to
2 Local Board Memorandum No.41, issued by the Director on November
3 30, 1951, and amended on July 30, 1968. That directive states
4 in relevant part:

5 " * * * *

6 2. A registrant should be considered to have
7 claimed a conscientious objection to war if
8 he has signed Series VIII of the Classifica-
9 tion Questionnaire (SSS Form No.100), if he
10 has filed a Special Form for Conscientious
11 Objectors (SSS Form No.150), or, IF HE HAS
12 FILED ANY OTHER WRITTEN STATEMENT CLAIMING
13 THAT HE IS A CONSCIENTIOUS OBJECTOR."

14 Appellant's February 26 letter states:

15 "I wish to claim status as a Conscientious
16 Objector to be classified as 1-O.

17 "Please send me application forms SSS 150."

18 That letter is clearly "a written statement claiming
19 "that he [Appellant] is a Conscientious Objector," within the
20 meaning of Selective Service Regulation § 1625.2 as construed
21 by the Director in his Memorandum No.41.

22 Communications by a registrant to his Board will be
23 given their manifest intent despite the use of isolated and
24 seemingly contradictory words or phrases.

25 Wyman v. La Rose, 9th Cir., 1955, 223

26 F.2d 849, 852

3 Although Appellant's Form 150 was not filed until ten
4 days after the mailing of his induction notice, it was supple-
5 mental only, and so, did not itself invoke the reopening process.

6 Thus, § 1621.11 states in relevant part:

7 "A registrant who claims to be a Conscientious
8 Objector shall offer information in substantia-
9 tion of his claim in a Special Form for Con-
10 scientious Objectors (SSS Form No.150) which,
11 when filed, shall become a part of his
12 classification questionnaire (SSS Form No.
13 100)." (Emphasis added)

14 The first sentence under the instructions on appellant's
15 Form 150 contains virtually the same language (EX. A, p.104).

16 There is even the suggestion in United States v.
17 Vincelli, 2d Cir., 1954, 215 F.2d 210, at p.213, which is
18 tempered somewhat on rehearing, 216 F.2d 681, because of
19 United States v. Nugent, 346 U.S.1, 73 S. Ct. 991, that the
20 mailing of the Form 150 in itself constituted a reopening of
21 the registrant's classification.

22 Here, the Board sent appellant Form 150 on March 2
23 with a mandate that it be returned on March 8. It was; and
24 thereafter, two Board members purported to render telephonic
25 decisions denying reopening.

26 Under any or all of the foregoing theories, it is

1 evident that appellant's claim preceded the mailing of his
2 induction notice, and his classification should therefore have
3 been reopened because stating a prima facie case for 1-0
4 classification.

5 Miller v. United States, 9th Cir., 1967,
6 388 F.2d 973

7 Stain v. United States, 9th Cir., 1956,
8 235 F.2d 339

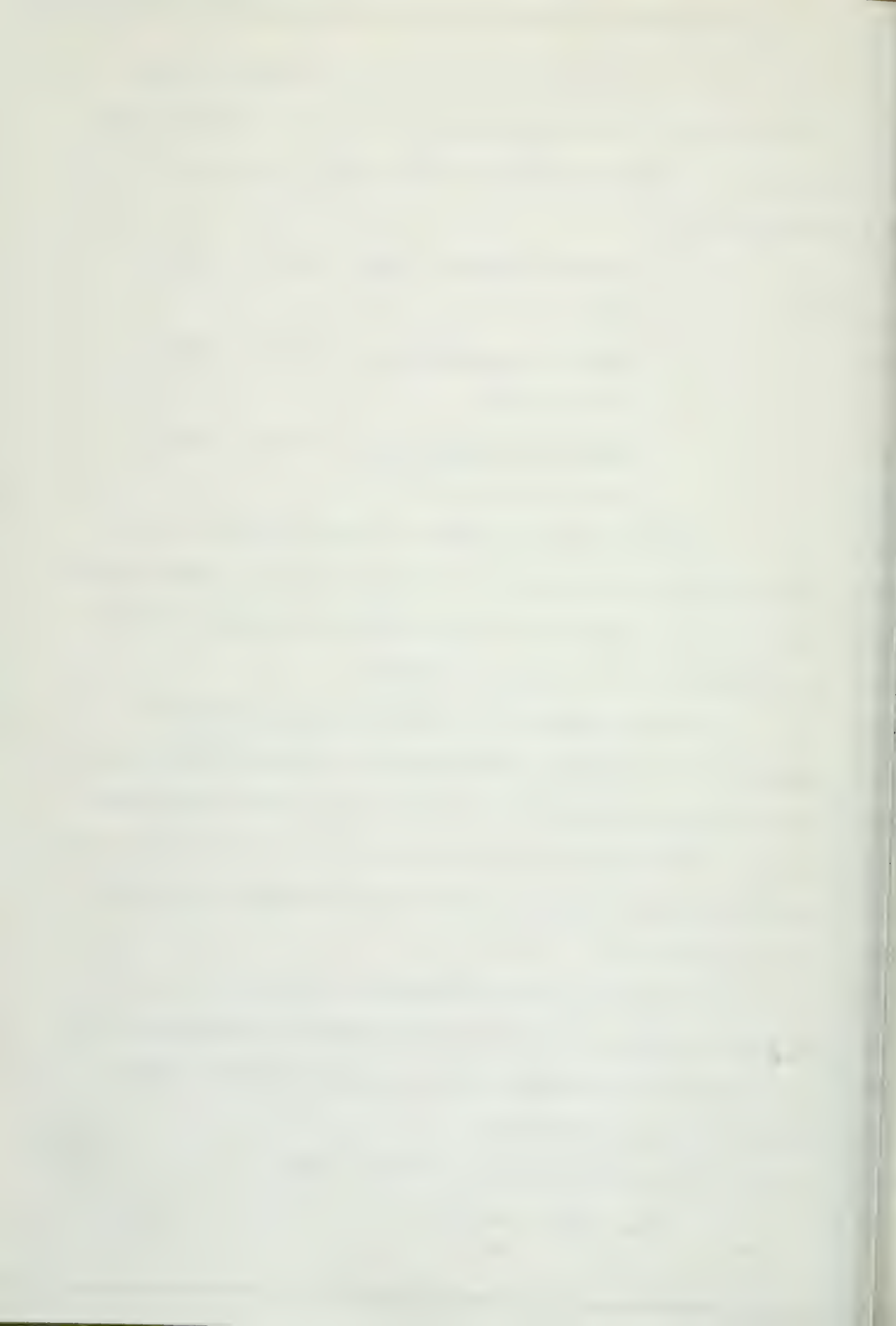
9 Brown v. United States, 9th Cir., 1954,
10 216 F.2d 258

11 The Government's assertion that appellant was not
12 prejudiced by the telephonic "meeting" of the two Board members
13 is, of course, mooted by the timeliness of appellant's claim;
14 and in any event is patently erroneous.

15 For one thing, the telephonic meeting deprived
16 appellant of his right to have the Board members fairly consider
17 the information presented in his Form 150, rather than have
18 portions of it, if any, or the clerk's interpretations thereof,
19 read to them over the phone; and in preference to an adjudica-
20 tion by a Court.

21 Furthermore, the telephonic "meeting" was not a mere
22 procedural defect; it was in contravention to the regulations
23 and Local Board Memoranda; and the Board therefore acted in
24 excess of its jurisdiction.

25 See: In Re Shapiro, 3d Cir., 1968,
26 392 F.2d, 397



1 Hence, the Board never really held a meeting and
2 therefore never ruled one way or the other on appellant's
3 request for reopening. Appellant was entitled to such a
4 decision.

5 Finally, appellant was prejudiced by the telephonic
6 "meeting" because it deprived him of his personal appearance
7 and appeal rights.

8 See: MacMurray v. United States, 9th Cir.,

9 1964, 330 F.2d 298.

10 Boswell v. United States, 9th Cir.,

11 1968, 390 F.2d 181.

12 Appellant's theory of the case, that is, that his
13 claim was filed before the mailing date of his induction notice,
14 obviates the need for discussing the maturation date of his
15 beliefs.

16 While the record is somewhat equivocal as to the
17 precise date thereof, we note that at trial, appellant answered
18 that question on cross-examination, thusly:

19 "A. Well, it's not something you know that
20 you can say yesterday I wasn't, today I
21 am. Its the kind of thing that comes
22 together with the realization that you're
23 being called upon to participate in the
24 military service.

25 "At that time I'm confronted with the
26 realistic problem and at this time that

1 the realization becomes uppermost in your
2 mind even though its been there all along."

3 (R. 32/21 - 33/4).

4 The Court recognized this as a rational basis for
5 reopening in Gearey, supra, 368 F.2d at p.150, when it observed:

6 "The realization that induction is pending
7 and that he may soon be asked to take
8 another's life, may cause a young man
9 finally to crystallize and articulate
10 his once vague sentiments."

11 (Emphasis supplied)

12 We also note that appellant not only refused to
13 submit to induction, but even rejected a Commission in the
14 United States Navy (Ex. A, p.130), although at one time he
15 apparently had considered applying for one (Ex. A, pp. 72, 130;
16 and, in the same vein, see also appellant's letter of April 13,
17 1965, at p. 54).

18 All doubts as to appellant's eligibility for reopening
19 of his classification should be resolved in his favor.

20 United States v. Alvies, D.C., N.D. Ca.

21 1953, 112 F. Supp. 618, 624 .

22 But we believe there can be no doubt that appellant's
23 claim was timely, and that if, as suggested by the Government's
24 Brief (p.15) the Board refused to reopen because believing
25 appellant's claim untimely, such denial was prejudicial error,
26 necessarily invalidating appellant's induction orders, and the

1 return of the file to the Board for an evaluation of appellant's
2 claim by proper standards.
3

4 POINT II

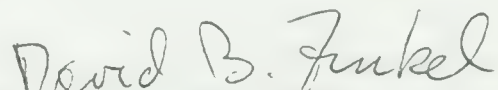
5 APPELLANT'S INDUCTION NOTICE WAS
6 INVALID BECAUSE MAILED BEFORE THE
7 EXPIRATION OF THE TIME AFFORDED AN
8 APPEAL AGENT FOR FILING AN APPEAL
9 IN APPELLANT'S BEHALF.

10 Appellant will not belabor this point because the
11 government offers no authorities to counter those suggested
12 in Appellant's Opening Brief as prevailing; and because the
13 question here is primarily one of statutory construction and
14 interpretation.
15

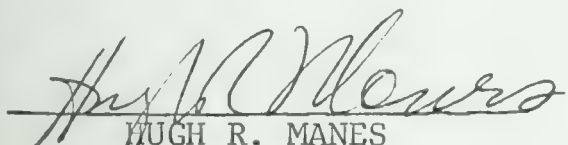
16 CONCLUSION

17 For all the reasons given in appellant's Opening
18 Brief, and in this one, his conviction should be reversed, and
19 the indictment ordered dismissed; or, in the alternative, the
20 case should be remanded, pending review, for further evidence
21 as suggested by appellant's unopposed motion.
22

23 Respectfully submitted,

24 

25 DAVID B. FINKEL
26 Attorney for Appellant

27 
28 HUGH R. MANES
Of Counsel

C E R T I F I C A T E

I CERTIFY that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.



DAVID B. FINKEL



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF
ANSWERING APPELLEE'S REPLY BRIEF

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DAVID B. FINKEL
3440 Wilshire Blvd., Suite 608
Los Angeles, California 90005

Attorney for Appellant

FILED

NOV 12 1968

HUGH R. MANES
3440 Wilshire Blvd., Suite 608
Los Angeles, California 90005

Of Counsel

WM. B. LUCK, CLERK

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THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HON. FRANCIS C. WHELAN, PRESIDING

DAVID B. FINKEL
3440 Wilshire Blvd., Suite 608
Los Angeles, California 90005

Attorney for Appellant

HUGH R. MANES
3440 Wilshire Blvd., Suite 608
Los Angeles, California 90005

Of Counsel.

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LOCAL BOARD MEMORANDUM NO. 72 IS APPLICABLE
TO THIS CASE

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LEON LEONARD MIZRAHI,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

LOCAL BOARD MEMORANDUM NO. 72

IS APPLICABLE TO THIS CASE.

Ehlert v. United States, No. 21, 930, 9th Cir.,
decided September 11, 1968 [rehearing en banc
pending].

1

1 significance.

2 Rather, appellee confines its reply to the proposition
3 that Local Board Memorandum (LBM) No. 72 is inapplicable here
4 because directed only to those four regulations cited in the
5 upper right hand corner thereof, all of which establish "dead-
6 lines" or time periods within which the registrant must act.
7 (A copy of said LBM is appended hereto as Exhibit A, and by
8 this reference is incorporated herein and made a part hereof.

9 Appellee cites no regulation, LBM or other authority
10 to support that position. Appellant submits that the more
11 logical interpretation is one which, in the absence of a regula-
12 tion or directive to the contrary, would permit application of
13 the LBM to those situations which its language may reasonably
14 be construed to reach.

15 Appellee's contention to the contrary notwithstanding,
16 the issue here is not whether LBM No. 72 modifies or affects
17 SSR §1625.2. LBM No. 72 simply provides a rule for determining
18 when a claim is filed. Since, thereunder, appellant's claim
19 was filed the day before the mailing of his induction notice,
20 the Board was not required to find a change of circumstance
21 beyond his control as a prerequisite to reopening. In no way
22 did this result modify or change the content, intent or meaning
23 of SSR §1625.2. Hence, the authorities cited at page 3 of
24 appellee's brief are superfluous, if not irrelevant. (Indeed,
25 the Sterrett case, which reverses the convictions of two regis-
26 trants for failure of the Board to follow applicable regulations,

1 does not even involve Selective Service instructions or memoranda)

2 Furthermore, whatever may have been the legal effect
3 of LBMs in 1954, when Sterrett was decided, or in the preceding
4 years when even earlier decisions cited by appellee were rendered,
5 it is clear from SSR §1606.51, and related sections, that LBMs
6 now have the force and effect of law where not in conflict with
7 the regulations.

8 cf. Levy v. Dillon, D.C. Kan. 1968, 286 F. Supp.

9 593, 596.

10 If, as appellee seems to agree (Reply Brief, p. 3)
11 the purpose of LBMs is to clarify the regulations, that objective
12 is not served unless the Local Boards are uniformly bound to
13 follow them.

14 Appellant has not found any other regulation, bulletin
15 or LBM providing that the date of actual receipt of a registrant's
16 communication, rather than its mailing date, controls the filing
17 date thereof. LBM No. 72 appears to be the only Selective Service
18 authority treating that subject.

19 The National Director was under no duty to select the
20 mailing date as the filing date. That he did so suggests that,
21 in cases where the filing date is critical, LBM No. 72 was in-
22 tended to help the registrant, or at least overt harsh conse-
23 quences where the registrant has acted within the time prescribed
24 by the regulations.

25 It requires no strain to read LBM No. 72 as embracing
26 the instant case. Under SSR §1625.2, appellant was required to



1 submit his claim before the mailing of his induction notice in
2 order to obviate the necessity of the Board finding a change of
3 circumstance.

4 SSR §1625.1(b) states that a registrant --

5 "....shall, within 10 days after it occurs,
6 report to the Local Board in writing any
7 fact that might result in the registrant
8 being placed in a different classification...."

9 Since an application to reopen must thus present new
10 facts within a specific time period, it is apparent that appel-
11 lant's claim to be a conscientious objector falls within the
12 ambit of LBM No. 72, even under appellee's version of its
13 applicability.

14 The government's contention that appellant's claim is
15 devoid of facts indicating a change of status within the preced-
16 ing ten days presumes that such a showing is required. Appellant
17 knows of no authority for such a requirement, and appellee cites
18 none.

19 As appellant pointed out in his reply brief, pp. 9 and
20 10, the ten day period begins to run as of the date that his
21 religious training and beliefs have crystalized into a conscien-
22 tious opposition to all war. Only then is he eligible for I-O
23 classification.

24 This court once observed that --

25 "....there can be no stronger proof of the
26 sincerity of the registrant's objections than

1 his willingness to subject himself to a
2 possible five year penitentiary sentence for
3 draft evasion rather than to submit to com-
4 pulsory service after his claim of exempt
5 status has been rejected."

6 Woo v. United States, 9th Cir., 1965, 350 F.2d
7 992, 995.

8 To reach that plateau of religious conviction requires,
9 for some, at least, an unavoidable confrontation with what
10 becomes for the registrant unconscionable alternatives. It is
11 at that moment of decision that a registrant may be said to have
12 become eligible for classification as a conscientious objector.

13 That moment arrived for appellant when his I-A
14 classification was affirmed on appeal (R. 32/21-33/4).

15 In any event, appellant had a right to have the Local
16 Board, rather than the Courts, consider when his claim had
17 matured, as well as to determine the sincerity and substance
18 thereof.

19 See: Boswell v. United States, 9th Cir., 1968,
20 390 F.2d 181, 183.

21 The Board did not make this determination here,
22 apparently because neglecting to treat appellant's claim as
23 timely filed as required by LBM No. 72.

24 For these reasons, as well as the others discussed in
25 appellant's briefs, appellant's conviction should be reversed
26 and a judgment of acquittal ordered so that the Local Board may

1 be afforded the opportunity to follow the regulations and
2 policies applicable to this case.
3

4 Respectfully submitted,

5 David Finkel
6 David Finkel
7 Attorney for Appellant

8 Hugh R. Manes
9 Hugh R. Manes
10 Of Counsel

11
12 C E R T I F I C A T E

13 I CERTIFY that, in connection with the preparation of
14 this brief, I have examined Rules 18 and 19 of the United States
15 Court of Appeals for the 9th Circuit, and that in my opinion,
16 the foregoing brief is in full compliance with those rules.

17 David Finkel
18 David B. Finkel
19
20
21
22
23
24
25
26



LOCAL BOARD MEMORANDUM NO. 72

ISSUED: DECEMBER 17, 1962

SUBJECT: TIMELY FILING OR SUBMISSION OF NOTICES
OR INFORMATION

Director.

SSS Reg.

1624.1

1626.2

1627.3

1641.0

1. Selective Service Regulations provide that a registrant and other specified persons, to be entitled to a procedural right or to qualify for a status, must file with or submit to the local board a notice or information within a specified period of time or before a "cut-off" date.

2. When such a notice or information is filed with or submitted to the local board by mail, the date of mailing as shown by the postmark on the envelope and not the date it was received by the local board shall be used in determining whether the filing or submission is timely.

3. The envelope in which any such notice or information is received shall be placed in the registrant's cover sheet attached to the contents of the envelope.

(TM 112)

Lewis B. Hrushey.



NO. 22728 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES DELGADO,

Appellant,

VSL

UNITED STATES OF AMERICA,

Appellee.

FILED

AUG 1 1968

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD
Assistant U. S. Attorney

1219 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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ROBERT L. BROSIO,
Assistant U.S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD
Assistant U. S. Attorney

1219 U.S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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NO. 22728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES DELGADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, CHARLES DELGADO (hereinafter referred to as Delgado), was indicted by the Federal Grand Jury for the Central District of California on April 5, 1967 [C. T. 3]. ^{1/} The Indictment contained Twelve Counts alleging that on four separate occasions Delgado did possess, conceal and transport as well as sell, certain specified quantities of heroin. The Indictment contained charges that Delgado had violated Title 21, United States Code, Section 174, and Title 26, United States Code, Section 4705(a). Counts one, two and three concerned the sale of approximately

^{1/} Refers to Clerk's Transcript.



7.150 grams of heroin on or about February 10, 1967; Counts four, five and six concerned the sale of approximately 7.460 grams of heroin on or about February 13, 1967; Counts seven, eight and nine concerned the sale of approximately 31.760 grams of heroin on or about March 20, 1967, and Counts ten, eleven and twelve concerned the sale of approximately 36.740 grams of heroin on or about March 22, 1967 [C.T. 3-14].

On April 24, 1967, Delgado appeared before the Honorable E. Avery Crary, United States District Judge, Central District of California, for arraignment and entered a plea of not guilty to all counts of the indictment [C.T. 15]. At this time Delgado was represented by retained counsel, Mr. Harvey Byron [C.T. 15]. Upon entry of the plea of not guilty the case was assigned to the Honorable Manuel L. Real, United States District Judge, for all further proceedings [C.T. 15].

On June 20, 1967, trial by jury commenced and this trial ended on June 22, 1967, when the jury returned a verdict of guilty on nine counts and not guilty on three counts [C.T. 42-44].

On June 27, 1968, Delgado filed a motion for a new trial and it was scheduled for hearing on August 7, 1967 [C.T. 49]. On the court's motion the date for the hearing on the motion for a new trial and sentencing was continued to September 11, 1967 [C.T. 52]. On September 11, 1967, the court ordered that the hearing for the motion for a new trial be vacated because Delgado has assumed a fugitive status. [C.T. 53.]

On December 5, 1967, a substitution of attorneys was filed



substituting in the Messrs. Olestead and Freedman for Mr. Byron, as attorneys for Delgado. On December 11, 1967, Delgado's motion for a new trial was denied [C.T. 58]. At this time Delgado was sentenced to a term of five years' incarceration on Counts one, two, three, four and five and five years on each Count six, ten, eleven and twelve, said sentences concurrent with each other but consecutive to the sentence in Counts one, two, three, four and five for a total of ten years in the custody of the Attorney General [C.T. 57]. On December 19, 1967, Delgado filed a notice of appeal [C.T. 59].

The jurisdiction of the District Court was based upon Title 21, United States Code, Section 174, and Title 26, United States Code, Section 4705(a). This Court has jurisdiction to review the judgment of the District Court, pursuant to Title 28, United States Code, Section 1291 and 1294.

II

STATEMENT OF FACTS

The Indictment was returned in twelve counts charging Delgado with the unlawful sale of heroin. This indictment involves four transactions, each transaction resulting in three specific charges against Delgado. The first six counts of the indictment concerned two sales of heroin to Bruce Spyrison (hereinafter referred to as "Spyrison"), and these sales occurred on February 10 and February 13, 1967. Counts seven through twelve involved two



sales of heroin by Delgado to Billy Harvey (hereinafter referred to as "Harvey"), on or about March 20 and March 22, 1967.

On June 20, 1967, the case was called and the jury selected. During the selection of the jury, Venireman Chancellor was selected and counsel for Delgado passed for cause, but did thank Mr. Chancellor [R. T. 35]. However, at this time, counsel for the Government approached the bench and objected to Delgado exercising any additional peremptory challenges [R. T. 35]. The Government represented to the Court that Mr. Delgado had exercised his six peremptory challenges and a discussion ensued as to whether there had been five or six challenges, and it was concluded that six challenges had been used. All counsel and the trial judge assumed that a defendant was entitled to only six challenges and therefore Delgado was denied the right to exercise his seventh challenge [R. T. 35-36].

On the second day of trial, out of the presence of the jury, the Court informed Delgado that he had been improperly denied some peremptory challenges, in that he was allowed only six and the law stated that he had a right to ten peremptory challenges [R. T. 157]. The Court asked Delgado and his attorney to make a decision either to waive the error or a mistrial would be declared and a new jury selected for a new trial. As the Court stated:

"You understand that you have ten peremptory challenges and that only six were exercised. We precluded you from exercising any further challenges."



The defendant: "I understand this."

The court: "You waive that error?"

The defendant: "Yes, sir." [R. T. 157-58].

This waiver by the defendant to being deprived of four peremptory challenges was agreed to by Delgado's counsel, Mr. Byron [R. T. 157-58].

The proof concerning the alleged transaction occurring on February 10, 1967, consisted of Spyrisson testifying that he was contacted by Delgado, a meeting was arranged for the purpose of purchasing heroin at spot number 4, which was the parking lot of a market [R. T. 86]. Spyrisson testified that he gave the money to Delgado and then followed him into an alley where Delgado pointed to the base of a telephone pole, and at this place, Spyrisson picked up the heroin [R. T. 88-90]. Agent Walker of the Federal Bureau of Narcotics testified that he had the receiver for the transmitter that had been attached to Spyrisson's person and overheard the conversation between Delgado and Spyrisson, wherein they discussed the sale of heroin [R. T. 164-165]. As soon as Delgado left, Spyrisson turned over approximately 7 grams of heroin to the Federal Bureau of Narcotics [R. T. 167].

Spyrisson also testified concerning the purchase of heroin on February 13, 1967, from Delgado. In this case, Spyrisson again met with the Agents of the Federal Bureau of Narcotics, was searched, and travelled to spot number 4, the market parking lot [R. T. 91-92]. Spyrisson got into Delgado's car and was driven into an alley where he picked up the heroin [R. T. 93]. After

picking up the heroin Spyrison walked back to his car, and turned the heroin over to the agents [R. T. 93]. Agent Walker testified that he followed Spyrison while he travelled with Delgado and observed Spyrison return to his car with the heroin [R. T. 170].

Harvey testified that on March 20, 1967, he had acquired approximately 30 grams of heroin from Delgado [R. T. 129-130]. This transaction was not made under the supervision of the Federal Bureau of Narcotics and Delgado was acquitted. On March 22, 1967, Harvey contacted Delgado and arranged to purchase heroin [R. T. 130-131]. Harvey testified that he met with Agents of the Federal Bureau of Narcotics, was searched, and given \$275 in cash [R. T. 132-133]. Harvey then drove to a prearranged location where he observed Delgado [R. T. 133]. Delgado got into Harvey's car and took the \$275 [R. T. 134]. Agent Westrate had the receiver to a transmitter that was placed on Harvey's person [R. T. 209]. Agent Westrate heard Delgado tell Harvey that the "stuff" was stashed a few blocks away and that Harvey should follow [R. T. 212]. Harvey then followed Delgado to a street several blocks from the initial meeting area and parked behind Delgado [R. T. 134, 212]. Delgado got out from his car, went back and picked up a Kleenex, apparently from the ground, and threw it in the car and departed [R. T. 135, 213]. The contents of this Kleenex were proven to be heroin [R. T. 69, 219]. Shortly after Delgado left, he was arrested by Agents of the Federal Bureau of Narcotics. [R. T. 216-217.] From Delgado's possession the agents obtained the \$275 of prerecorded serial

numbered funds that had been provided Harvey for purchase of the heroin [R. T. 207, 216].

The trial concluded on June 22, 1967, and the jury returned a verdict finding Delgado guilty on nine counts and not guilty on counts seven, eight and nine of the Indictment [R. T. 352-353]. Sentencing was scheduled for August 7, 1967, however, this matter was continued on the Court's own motion to September 11, 1967 [C. T. 52]. On September 11, 1967, the defendant failed to appear and was determined to be a fugitive [C. T. 53]. On December 11, 1967, the defendant did appear in court and was sentenced to the custody of the Attorney General for a period of ten years [C. T. 57].



III

SPECIFICATION OF ERRORS

- A. CAN THE DEFENDANT ALLEGE AS ERROR ON APPEAL THE FACT THAT HE WAS ERRONEOUSLY PRECLUDED FROM UTILIZING FOUR OF HIS PEREMPTORY CHALLENGES WHEN THIS ERROR WAS EXPRESSLY WAIVED BY DEFENDANT AND HIS COUNSEL DURING THE TRIAL?
- B. DID THE TRIAL COURT COMMIT ERROR BY PERMITTING A WITNESS-AGENT TO REMAIN IN THE COURTROOM DURING THE TRIAL WHEN NO OBJECTION WAS RAISED AT THE TRIAL?
- C. DOES THERE EXIST AN ABUSE OF DISCRETION IN HEARING AND DENYING A MOTION FOR A NEW TRIAL, WHEN COUNSEL FOR THE DEFENDANT BECAME ATTORNEY OF RECORD SIX DAYS PRIOR TO THE HEARING?
- D. DOES THE RECORD REFLECT SUFFICIENT EVIDENCE TO JUSTIFY THE CONVICTION?
- E. IS IT PREJUDICIAL ERROR TO FAIL TO GIVE AN INSTRUCTION WARNING THE JURY TO VIEW WITH CAUTION THE TESTIMONY OF INFORMERS, WHEN NO INSTRUCTION WAS REQUESTED AT TRIAL BY COUNSEL FOR THE DEFENDANT?

ARGUMENT

A. A WAIVER OF AN ERRONEOUS
DENIAL OF DEFENDANT'S RIGHT
TO EXERCISE A PEREMPTORY
CHALLENGE PRECLUDES THAT
QUESTION FROM BEING RAISED
ON APPEAL.

Defendant Delgado alleges that the conviction should be reversed because he was allowed only six of his ten authorized peremptory juror challenges [Appellant's Brief, p. 12]. It is further argued that the error committed on the first day of trial cannot be cured or waived by the proceedings that occurred on the second day of trial [Appellant's Brief, p. 16]. It is not disputed that Delgado was improperly limited to six peremptory challenges. When Venireman Chancellor was interrogated the defendant made the statement "The defendant will thank you" [R.T. 35], and at that time the Government sought a hearing at the bench. At this discussion at the bench, out of the hearing of the jury, the Government contended that the defendant had utilized his six peremptory challenges and a discussion followed whether it had been five or six. The court held that the defendant had exercised six challenges, and the defendant was precluded from exercising any additional peremptory challenges. [R.T. 35-36].

On the second day of the trial prior to bringing the jury in, the court stated:

"Mr. Byron, I made a mistake yesterday. You have ten peremptory challenges and not six. We have

two alternatives. We have the alternative that you and the defendant, you might consult with him, accept the jury based upon the fact that you were not given ten peremptory challenges or declaring a mistrial and getting a new panel" [R. T. 157].

At that time, Mr. Byron, counsel for defendant, said:

"Your Honor, we will accept the jury as now impaneled" [R. T. 157].

The court then addressed the defendant Delgado and stated:

"You understand that you have ten peremptory challenges but only six were exercised. We precluded you from exercising any further challenges."

The defendant: "I understand this."

The court: "You waive that error?"

The defendant: "Yes, sir." [R. T. 158.]

It is respectfully submitted that in light of the court's statement to Delgado and his counsel, and their clear and unequivocal replies, that a knowing and conscious waiver of the error was made by Delgado. While no case directly on point has been found, it is respectfully submitted that the reasoning set forth in Patton v. United States, 281 U.S. 276, (1930), clearly establishes that a knowing and intelligent waiver of this error, with the defendant's consent, is binding upon that defendant and effectively precludes him from raising this alleged error



on appeal. See also, Horne v. United States, 264 F.2d 40 (5 Cir. 1959), cert. denied 360 U.S. 934, where the court held that even though a written waiver is required to complete a trial with a jury of less than twelve people, this is not a mandatory requirement that it be in writing, but was designed merely to be certain that the right was knowingly and intelligently waived. It is respectfully submitted that the waiver of the defendant Delgado fits squarely within the principles set forth in the cases of Patton v. United States, supra, and Horne v. United States, supra.

Appellant attempts to circumvent his waiver by alleging that the waiver was insufficient because he was not presented with all conceivable alternatives to correct the error. Appellant contends that the court, on its own motion, could not effectively declare a mistrial for this error because jeopardy would attach and a second trial could not be possible. In support of this proposition appellant cites the case of Howard v. United States, 372 F.2d 294 (9 Cir. 1967). In the Howard case the court held that while the general rule is jeopardy attaches when a jury is impaneled there exists certain exceptions. One of the clear exceptions is that a mistrial can be declared when unforeseeable circumstances forces a determination of the trial without a verdict. Id. at 298. In this case the error of the Assistant United States Attorney, the court and of counsel for Delgado concerning the proper number of peremptory challenges was certainly unforeseeable. No case authority has been found that



would indicate the court could not declare a mistrial, and allow the case to be retried. To hold to the contrary would place an untenable premium on form and would not be in the interest of justice. The alternative would be that upon conviction, the defendant appeals and upon a reversal a new trial would be instituted. This would be a costly, and awkward approach to correcting an error that was noticed at the outset of a trial.

However, even if appellant's contention is deemed to have merit, it is not a question for review in this case because Delgado and his counsel chose to proceed with the jury as constituted and, therefore, waived any speculative as well as real error that may have existed.

B. THERE DID NOT EXIST ANY
 VIOLATION OF THE WITNESS
 EXCLUSION ORDER IN THE
 TRIAL COURT.

Appellant contends that there was a violation of the witness exclusion order because Agent Westrate of the Federal Bureau of Narcotics sat at counsel table and did testify for the Government [Appellant's Brief, pp. 16-19]. Counsel for Delgado moved that there be an exclusion of the Government's witnesses from the courtroom and the court ordered that the witnesses be excluded [R. T. 50]. Counsel for the Government requested that Agent Westrate be allowed to remain in the courtroom at counsel table and the court was informed that Agent Westrate would testify.



[R.T. 50.] The court ordered that "Mr. Westrate may remain at counsel table [R.T. 50]. No objection was raised to this order by counsel for Delgado and the remaining witnesses were excluded. The entire record is void of any indication that any other Government witness was improperly in the courtroom or did transmit any information. As the courts so often state:

"We do not presume errors; we require the appellant to demonstrate it."

Sica v. United States, 325 F.2d 831
(9 Cir. 1963), at 836, cert.
denied 376 U.S. 952.

It is also well established that the control of witnesses and their exclusion or presence during a trial is left to the sound discretion of the trial court. See United States v. Bostic, 327 F.2d 983 (6 Cir. 1964). In fact, even if a violation of an exclusion order is established, it is up to the sound discretion of the trial court to determine what measures are necessary to rectify the situation.

See Spindler v. United States,
336 F.2d 678 (9 Cir. 1964).

It has always been incumbent upon an appellant to show what prejudice he has suffered in considering the propriety of a refusal to exclude witnesses.

See Kaufman v. United States,
163 F.2d 404 (6 Cir. 1947),
cert. denied 333 U.S. 857;



Mitchell v. United States, 126 F.2d 550

(10 Cir. 1942),

cert. denied 316 U.S. 702, reh.

denied 324 U.S. 887.

The failure of the defendant Delgado to indicate in any way how the order was violated, what prejudice, if any, was suffered by the defendant Delgado, and the lack of any objection to Agent Westrate's presence in the courtroom clearly renders appellant's alleged error to be frivolous and totally without merit.

C. THE TRIAL COURT DID NOT
ABUSE ITS DISCRETION IN
DENYING DEFENDANT DEL-
GADO'S MOTION FOR A NEW
TRIAL.

On June 27, 1967, defendant Delgado through his attorney, Harvey Byron, filed a motion for a new trial and noticed said motion to be heard on August 7, 1967 [C.T. 49-50]. The hearing was rescheduled on the court's own motion for September 11, 1967 [C.T. 52]. On September 11, 1967, the court entered its order vacating defendant Delgado's motion for a new trial because Delgado was a fugitive and not present for the hearing [C.T. 53]. The Clerk's Transcript establishes that no waiver of the defendant Delgado's presence at the hearing had been filed. On November 27, 1967, the defendant Delgado was again in custody and appeared with his counsel, Mr. Byron. Counsel for Delgado moved for a sub-



stitution of attorneys for the purpose of the probation and sentencing and for the hearing on the motion for the new trial. The court ordered said motion denied [C.T. 54]. On December 5, 1967, a substitution of attorneys was filed, substituting in Norman T. Ollstead and Alan Freedman for Harvey Byron. This substitution of attorneys was dated December 1, 1967, some ten days prior to the scheduled hearing on the motion for a new trial. [C.T. 55.] On December 11, 1967, the defendant's motion for a new trial was denied [C.T. 58].

The accepted standard for reviewing a ruling denying a motion for a new trial is to determine whether or not there has been a clear abuse of discretion on the part of the trial court in denying the motion.

See Lindsey v. United States, 368 F.2d 633

(9 Cir. 1966), at 636;

Straight v. United States, 263 F.2d 811

(9 Cir. 1959) at 813.

The motion filed in this case by Mr. Byron basically alleged that the request for a new trial was on all statutory grounds with emphasis on the alleged insufficiency of the evidence to warrant the conviction [C.T. 50].

In reviewing the evidence of the case, infra, it will clearly be shown that there exist substantial evidence upon which to justify the conviction of defendant Delgado. The Honorable Manuel L. Real, United States District Judge, did have the opportunity to preside over the entire trial of this case and was



also aware of Delgado's fugitive status after the jury returned its verdict. If, as the appellants contend, the basic purpose of a motion for a new trial is that Judge Real was to sit as a "thirteenth juror" then there can hardly be any doubt that based upon the evidence and his ruling the thirteenth juror was not inclined to alter the prior verdict.

Counsel for Delgado alleged that they were denied their right to submit arguments because they did not try the case and the transcripts of the trial were not available. A continuance of a scheduled court proceeding is left to the sound discretion of the trial court. If counsel have not prepared their case, after having ten days to do so, it can hardly be alleged the denial of a continuance was an abuse of discretion.

In order to warrant a reversal it is incumbent upon appellants to show what prejudice Delgado suffered by the Court's refusal to grant a continuance of the hearing on the motion for a new trial. See Sica v. United States, supra. Counsel for appellant has failed to show any argument or reason that they could have presented to Judge Real on the motion for a new trial that would even remotely indicate that a new trial would be granted. Judge Real was very familiar with the facts of this case, and it was imminently fair and proper for the motion to be ruled upon on December 11, 1967. It is respectfully submitted that the record is void of any facts indicating an abuse of discretion for denying the motion for a new trial, or for a continuance of the hearing on the motion.



D. THE EVIDENCE IN THIS CASE
CLEARLY ESTABLISHES THAT
CHARLES DELGADO DID VIOLATE
THE CRIMES FOR WHICH HE WAS
CONVICTED BEYOND A REASON-
ABLE DOUBT, AND THERE EXISTS
SUBSTANTIAL EVIDENCE TO JUSTIFY
THIS CONVICTION.

Appellant's argument that there does not exist sufficient evidence to justify the conviction of Delgado is apparently premised upon the erroneous assumption that the evidence indicates that the heroin belonged to Spyrison and Harvey, and not the appellant [Appellant's Brief, p. 23]. The apparent theory utilized by appellant is that Spyrison and Harvey framed Delgado, because they sought favors from the Government and owed Delgado money. Harvey did acknowledge that he owed Delgado \$500, but it was for a previous purchase of heroin [R.T. 139].

The evidence in the instant case upon which Delgado was convicted, establishes that on February 10 and February 13, Spyrison was searched and followed to spot No. 4, a code designation for a parking lot, where he met the defendant, Delgado [R.T. 87-88, 92-93]. This fact was observed by agents of the Federal Bureau of Narcotics [R.T. 159, 170]171, and 198-201]. Agent Walker also overheard conversation concerning the sale of heroin by Delgado, because a Kel transmitter had been placed on the person of Spyrison [R.T. 163-165]. On both occasions Delgado did lead Spyrison to the place where the narcotics were located and pointed out the heroin to Spyrison, the purchaser [R.T.



89, 93]. In fact Agent Westrate saw Delgado extending his arm and pointing in an alley where heroin was subsequently found by Spyrison [R. T. 201]. On March 22, 1967, Agents of the Federal Bureau of Narcotics observed Harvey meet with defendant Delgado [R. T. 210]. Prior to this meeting the agents searched and gave Harvey \$275 to purchase heroin from Delgado [R. T. 203]. The agents observed Harvey follow the defendant Delgado and park behind Delgado's automobile [R. T. 213]. Delgado went to Harvey's car and, according to Harvey, threw the heroin on the seat of Harvey's car [R. T. 133]. Agent Westrate overheard the conversation between Harvey and Delgado. During this conversation, Delgado stated the "stuff" was a few blocks away, and instructed Harvey to follow [R. T. 212]. After determining that heroin had been transferred, the agents apprehended Delgado. Subject to a search incident to this arrest, Delgado was found in possession of the \$275 of pre-recorded serial numbered money used to pay for the heroin [R. T. 204, 217].

Appellant has failed to cite any case which would even remotely indicate that the evidence presented against Delgado was insufficient to justify this conviction. It is respectfully submitted that the question of credibility between defendant Delgado, Spyrison and Harvey, considered with the corroboration provided by the agents, is clearly enough evidence to justify Delgado's conviction. In this case there exists overwhelming evidence in support of Delgado's conviction.



E. WHEN AN INFORMER'S TESTIMONY
IS CORROBORATED, AND NO INSTRUC-
TION CONCERNING THE WEIGHT TO
BE GIVEN AN INFORMANT'S TESTI-
MONY IT IS NOT ERROR FOR THE
COURT TO FAIL TO GIVE A CAUTION-
ARY INSTRUCTION CONCERNING AN
INFORMER'S TESTIMONY.

Appellant contends that it was error and a denial of due process for the court to fail to give a cautionary instruction concerning the testimony of Spyrison and Harvey because they were known narcotics addicts and possibly had something to gain from the conviction of defendant Delgado [Appellant's Brief, p. 27]. But appellant fails to indicate just what type of a cautionary instruction he would give, because neither in appellant's brief nor at the trial was any request made for a cautionary instruction. However, at the commencement of trial the court did carefully instruct the jury that they were to be the sole judges of the credibility of every witness, this included the fact that their credibility is to be tested on whether they have been convicted of a felony or not, and any bias or special interest that they may have in the case. [R. T. 43-44.] In the present case, Spyrison and Harvey did admit their previous violations of the law [R. T. 120-121, and 139-141], and they did testify that they were seeking a benefit from the Government by helping to bring the defendant Delgado to justice [R. T. 123-124 and 150].

It is up to the sound discretion of the trial court to determine whether a cautionary instruction is required concerning



the testimony of informers. See United States v. Hoffa, 349 F.2d 20 (6 Cir. 1965), at 52, cert. denied 382 U.S. 1024. In considering the necessity of a cautionary instruction on the credibility of Spyrisson and Harvey, it is respectfully submitted that the corroboration itself precluded any necessity of depending solely upon their testimony to obtain the conviction of defendant Delgado. Each of the transactions occurred under surveillance agents and on two occasions radio transmitters were utilized whereby conversations were overheard. If sufficient corroboration exists, then a cautionary instruction is not required. See Lujan v. United States, 348 F.2d 156 (10 Cir. 1965), cert. denied 382 U.S. 889. Even in cases where a specific instruction has been requested at trial, the courts have held that a general bias instruction will be sufficient when the informer's testimony is corroborated. See Orebo v. United States, 293 F.2d 747 (9 Cir. 1961), cert. denied 368 U.S. 958.

It is difficult to understand why appellant has raised this issue when the court specifically asked counsel for Delgado whether he anticipated submitting any instructions to the jury. Counsel for Delgado informed the court that he did not anticipate submitting any additional instructions [R.T. 239]. Counsel for Delgado reviewed all proposed instructions and did not object to the instructions, nor were any additional instructions requested. [R.T. 239-45]. Based upon the instructions given, counsel for

elgado's approval thereof, and the totality of the evidence,
is respectfully submitted that appellant's contention is totally
without merit.

For the reasons set forth in the above argument, it is
respectfully submitted that the conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

DENNIS E. KINNAIRD
Assistant U. S. Attorney

Attorneys for Appellee
United States of America



United States
Court of Appeals

for the Ninth Circuit

JUN 19 1968

UNITED STATES OF AMERICA,

Appellant,

v.

DOROTHY C. REGAN,

Appellee.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLANT

MITCHELL ROGOVIN,
Assistant Attorney General.

MEYER ROTHWACKS,
GRANT W. WIPRUD,
DAVID ENGLISH CARMACK,
*Attorneys,
Department of Justice,
Washington, D.C. 20530.*

Of Counsel:

SIDNEY I. LEZAK,
United States Attorney.

NORMAN SEPENUK,
Assistant United States Attorney.

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United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

DOROTHY C. REGAN,

Appellee.

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLANT

OPINION BELOW

The memorandum opinion (I-R. 19-20) of the District Court is not officially reported.

JURISDICTION

This appeal involves federal income taxes for the calendar years 1960, 1961, and 1962 in the total amount of \$148.70, plus interest. (I-R. 21-22.) The assessed deficiencies were paid by the taxpayer. (I-R. 25.) Claims for refund were timely filed on June 7, 1966, with the District Director in Portland, Oregon. (I-R. 7-9.) Within the time provided by Section 6532 of the Internal Revenue Code of 1954, on November 18, 1966, the taxpayer brought this action in the District Court for recovery of the taxes paid. (I-R. 1-9.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court was entered on November 6, 1967. (I-R. 21-22.) The notice of appeal was filed within sixty days thereafter, on January 4, 1968. (I-R. 28.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

As joint venturers, taxpayer and others acquired timber-cutting rights, constructed access roads to the timber stand at their own expense, and transferred the cutting rights in a transaction qualifying for capital gain treatment under Section 631(b) of the Internal Revenue Code of 1954. The question is whether taxpayer's share of the cost of the access

roads is deductible as business expense from ordinary income, as taxpayer contends and the District Court held, or is recoverable only by way of offset in the Section 631(b) computations of capital gain from the transaction, as the Government contends.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*.

STATEMENT

The material facts, as found by the District Court (I-R. 23-25) and reflected in the agreements stipulated into evidence (Pltf. Exs. 1, 2 and 3), may be summarized as follows:

In April, 1960, taxpayer joined with others in a joint venture (hereinafter "Idapine Tenants"). They purchased, as tenants-in-common, the assets of a partnership in the lumbering business. These assets included logging equipment, lumber manufacturing and remanufacturing plants, and all of the capital stock of Idapine Mills, Inc., an Oregon corporation. The operating equipment was then leased to the corporation. Taxpayer had a one per cent interest in the joint venture. (Pltf. Ex. 1, pp. 1, 3.)

Under a contract with the Forest Service, Idapine Tenants acquired the right to cut merchantable timber on certain Government lands at specified stumpage rates of payment per thousand board feet cut and removed. Idapine Tenants agreed to construct the access roads to the timber stand. If the Forest Service had constructed the roads, amounts reflecting amortization of the cost would have been added to the stumpage rates payable by Idapine Tenants. (Pltf. Ex. 3, pp. 1-4, 7(1), Sec. 7f.1.)

Idapine Tenants constructed the access roads (I-R. 24) and transferred its cutting rights to Idapine Mills, Inc., its wholly-owned operating company, in consideration of specified stumpage payments per thousand board feet cut and removed. (Pltf. Ex. 2, pp. 1-2 and Ex. B).¹

During the taxable years, the members of the joint venture, including taxpayer, amortized the cost of the access roads on the basis of the quantity of timber sold. In her returns, taxpayer deducted her proportionate share of the road amortization as ordinary and necessary business expense.

¹ The agreements in evidence between the Forest Service and Idapine Tenants and between Idapine Tenants and Idapine Mills, Inc., are not the actual agreements involved, but were jointly offered in evidence as representative in their terms of the actual agreements. (II-R. 15-16.)

The Commissioner disallowed these deductions, determining that the cost of the roads was part of the cost of the timber sold by the joint venture during the taxable years. Taxpayer paid the deficiencies assessed, filed timely claims for refund and, on their disallowance, commenced the instant litigation. (I-R. 24-25.)

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in holding that the costs of the access roads, as amortized, were deductible from income as ordinary business expense.

2. The District Court erred in failing to hold that the costs of the roads were part of the costs to the joint venture of the timber, and recoverable only by way of offset in the Section 631 (b) computations of capital gain from the joint venture's transaction with the corporation.

SUMMARY OF ARGUMENT

Taxpayer and others were members of a joint venture, Idapine Tenants, which acquired rights to cut timber on Government land. They constructed access roads to the timber stand at their own expense and transferred the cutting rights to their wholly owned corporation in consideration of pay-

ments geared to and dependent upon the cutting and removal of the timber. The transaction with the corporation qualified for capital gain treatment as a "disposal" of timber, under Section 631(b) of the 1954 Code, the gain being computed by offsetting Idapine Tenants' "adjusted depletion basis" against the gross proceeds, i.e., the payments from the corporation. Under relevant statutory and regulatory provisions, the joint venture's "adjusted depletion basis" was its adjusted cost basis in the timber (or timber cutting rights), and that basis had to be amortized and offset ratably against the payments from the corporation in computing capital gain.

Idapine Tenants capitalized and amortized the costs of the access roads — but the District Court held that they were entitled to deduct the costs, as amortized, as ordinary and necessary business expense. This was error. The costs of the roads were incurred to produce, and were an integral part of, the transaction treated by Section 631(b) as a completed sale yielding capital gain. They were thus a part of Idapine Tenants' adjusted cost basis and recoverable only by way of offset in the Section 631(b) computations of capital gain. This result is required by the statutory and regulatory scheme and by relevant decisions. The cases cited by the District Court in support of its ruling are not in point.

ARGUMENT

THE JOINT VENTURE'S COSTS OF CONSTRUCTING ACCESS ROADS TO THE TIMBER WERE RECOVERABLE ONLY BY WAY OF OFFSET IN THE COMPUTATIONS OF CAPITAL GAIN UNDER SECTION 631(b)

1. The requirements of Section 631(b) in the context of pertinent statutory and regulatory provisions, and legislative history.

Section 631(b) of the Internal Revenue Code of 1954, Appendix, *infra*, accords preferential capital gain treatment in the case of certain timber transactions. It provides in pertinent part that:

In the case of the disposal of timber held for more than 6 months before such disposal, by the owner thereof under any form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from the disposal of such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or a loss, as the case may be, on the sale of such timber.

The term "owner" is defined in Section 631(b) as "any person who owns an interest in such timber, including * * * a holder of a contract to cut timber." Such an "owner" retains an "economic interest" in timber, while effecting its "disposal," where he transfers cutting rights in consideration of

payments geared to and dependent upon the cutting and removal of the timber.²

It is undisputed in this litigation that the transfer of cutting rights from Idapine Tenants, the joint venture, to Idapine Mills, Inc., its wholly owned operating company, was a "disposal of timber by the "owner" within the purview of Section 631(b). The joint venture retained an "economic interest" since the transfer was in consideration of unit payments for timber when and as cut and removed. (Pltf. Ex. 2, pp. 1-2, Ex. B.) Hence these payments, as received by Idapine Tenants, were to be treated under Section 631(b) as the gross proceeds of a capital transaction. The question is whether the cost of the access roads was includible in Idapine Tenants' "adjusted depletion basis" which, under Section 631(b), must be offset against the gross proceeds in computing Idapine Tenants' capital gain.

² See the definition of an "economic interest" for depletion purposes in Treasury Regulations on Income Tax (1954 Code), Section 1.611-1 (b) (1). The capital nature of the gain in such transactions is reflected in the language employed in Section 631 (b) ("shall be considered as though it were a gain * * * on the sale * * *") and confirmed by cross-reference in the capital transaction provisions of Section 1231 (b) (2) of the 1954 Code. Section 631 (a) accords similar capital gain treatment, on timely election, to the taxpayer who acquires the cutting rights and harvests the timber.

At the outset, it should be noted that Section 631(b) is not an isolated and self-contained statute. To be sure, it is special legislation. It was originally added to the 1939 Internal Revenue Code, as Section 117(k)(2), by Section 127(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21, and the underlying legislative history makes it clear that "owners who sell their timber on a so-called cutting contract under which the owner retains an economic interest" are to be treated as on the same footing, for tax purposes, as taxpayers who sell timber stands outright. S. Rep. No. 627, 78th Cong., 1st Sess., p. 25 (1944 Cum. Bull. 973, 993)³ Section 631 (b) is nevertheless a provision within the depletion context, and its use of the term "adjusted depletion basis" (as its use of the term "economic interest") can only be understood in that context.

Section 611(a) of the 1954 Code, Appendix, *infra*, authorizes a "reasonable allowance for depletion" in the case of timber and natural deposits, such allowance to be made "in all cases * * * under regulations prescribed by the Secretary or his delegate." Section 612, Appendix, *infra*, requires that the basis on which depletion is to be allowed, except as otherwise provided, "shall be the adjusted basis

³ See Rowen, Taxation of Income from Timber Properties, 33 Taxes 336 (1955).

provided in Section 1011 for the purpose of determining the gain upon the sale or other disposition of such property," i.e., the timber or the natural deposit. Section 613 of the Code, which authorizes percentage depletion, makes no provision for such depletion in the case of timber. Hence, as set forth in Treasury Regulations under Section 612,⁴ the adjusted depletion basis for timber "is the cost or other basis determined under section 1012, relating to the basis of property, adjusted as provided in section 1016, relating to adjustments to basis * * *".

No basis for depletion other than cost is authorized in the instant case, under the terms of Section 1012, Appendix, *infra*, and none of the adjustments to basis required by Section 1016 is pertinent save for the general requirement of Section 1016(a)(1). Appendix, *infra*, that proper adjustments shall be made "for expenditures, receipts, losses, or other items, properly chargeable to capital account * * *."

In sum, the "adjusted depletion basis" for timber, referred to in Section 631(b), is Idapine Tenants'

⁴ Treasury Regulations on Income Tax (1954 Code), Section 1.162-1 (a), Appendix, *infra*. There is no discrepancy between the reference therein to Section 1012 of the Code, Appendix, *infra*, and the reference in Section 612 to Section 1011, Appendix, *infra*, since Section 1011 refers in turn to Section 1012. The special rules for adjusting the cost depletion basis of timber as set forth in Section 1.612-1 (b) of the above-cited Treasury Regulations, Appendix, *infra*, are inapplicable here.

cost basis as adjusted for expenditures and other items properly chargeable to the capital account. It is this adjusted cost basis which must be offset against the gross proceeds ("the amount realized from the disposal of such timber") which Idapine Tenants received from Idapine Mills, Inc., in consideration of the transfer of the cutting rights.

Since the gross proceeds under the instant cutting contract are payments geared to the cutting and removal of the timber, it follows logically that Idapine's adjusted cost basis should be amortized and offset ratably against the payments received from the corporation, over the estimated period required for completion of the harvest. And this is precisely what is required by the pertinent provisions of Treasury Regulations on Income Tax (1954 Code). Section 1.631-2, Appendix, *infra*, relating to the Section 631(b) computation, provides that the "adjusted basis shall be computed in the same manner as provided in section 611 and the regulations thereunder with respect to the allowance for depletion." Section 1.611-3(a), Appendix, *infra*, provides that in the case of timber "the capital remaining in any year recoverable through depletion allowances is the basis provided by section 612 and the regulations thereunder." And Section 1.612-1(a), Appendix, *infra*, relating to cost basis depletion under Section 612 of the Code, provides that: "In the case of the sale of

a part of such property, the unrecovered basis thereof shall be allocated to the part sold and the part retained".⁵

Thus, it is clear that Idapine Tenants' adjusted cost basis in the timber, as computed for cost depletion purposes, had to be amortized and offset ratably against the payments received in the capital gain computations prescribed by Section 631(b).

2. The joint venture's costs of constructing the access roads were part of their adjusted cost basis and, as such, includible in the Section 631(b) capital gain computations.

Taxpayer agrees with the Government that the costs of the access roads had to be capitalized at the outset and states that these costs were, in fact, so capitalized. (II-R. 12.) The District Court found that the joint venture amortized these costs on the basis of timber quantities. (I-R. 24.) As taxpayer states (II-R. 12), they "amortized the cost of those logging roads over the life that we brought in the income", i.e., the payments from the corporation for

⁵ More explicitly, Section 1.611-3(b) (2) provides that the "depletion unit" for timber in a given year is the cost basis divided by the number of timber units, with adjustments to basis for the cost of timber acquired during the year "plus proper additions to capital", and adjustments to the number of timber units "by way of correcting the estimate of the number of units remaining available in the account".

timber cut and removed. Nevertheless, taxpayer contends (II-R. 12) that the costs of the roads were "an ordinary and necessary expense of carrying on the sale" of the timber to the corporation; that they were "in the business of selling timber", and therefore entitled to deduct the road costs, as amortized, as ordinary and necessary business expenses.

We submit that the District Court clearly erred in sustaining taxpayer's contentions. Idapine Tenants were entitled to capital gain treatment under Section 631(b) only because, by virtue of that provision, their transfer of cutting rights to the corporation was treated as a completed sale in consideration of deferred payments — a "disposal" of timber under a contract reserving to them an "economic interest" in the form of payments geared to harvesting. The agreement transferring cutting rights cannot, at one and the same time, be treated as a completed capital transaction with respect to some of the costs incurred to produce it, and a mere executory arrangement to make continuing sales in the course of a trade or business with respect to other costs of the same nature.

The costs to Idapine Tenants of constructing the access roads were, quite obviously, as much a part of the joint venture's adjusted cost of depletion basis in the timber (or timber cutting rights) as the pay-

ments to be made to the Forest Service. Under Idapine Tenants' contract with the Forest Service, the payments to the latter would have been augmented by the amount of the road costs, as amortized, if the Forest Service had built the roads. (Pltf. Ex. 3, pp. 1-4.) The road costs were no less a part of the joint venture's adjusted cost basis, when borne directly by the joint venture. Under Section 1016(a)(1) of the Code, Appendix, *infra*, the road costs were expenditures properly chargeable to the capital account involved. They were incurred to produce the capital gain from the "disposal" of the timber, and cannot be severed from the transaction or the Section 631(b) computations.

Indeed, the Treasury Regulations under Section 631(b) explicitly provide that amounts paid in the acquisition of timber or timber cutting rights, however designated, shall be treated as the cost of the timber and shall constitute part of the taxpayer's basis for the purposes of Section 631(b).⁶ Idapine Tenants' costs of constructing access roads, which were essential to the exercise of the cutting rights, were surely integral to the acquisition and "disposal" of such rights. They were "direct expenses incurred in connection with the disposal of * * * timber",

⁶ Treasury Regulations on Income Tax (1954 Code), Section 1.631-2 (e) (1), Appendix, *infra*.

and, accordingly, includible in the Section 631(b) computation — not deductible from ordinary income. Rev. Rul. 58-266, 1958-1 Cum. Bull. 520, 523, Appendix, *infra*, p. 17.

As this Court said in *Spangler v. Commissioner*, 323 F. 2d 913, 921:

Costs connected with disposition of a capital asset are also capital expenditures to be added to taxpayer's basis, or offset against the sales price, rather than expenses deductible from ordinary income.

Accord, *Ward v. Commissioner*, 224 F. 2d 547, 555 (C.A. 9th, 1955); *United States v. Morton*, 387 F. 2d 441, 449-450 (C.A. 8th, 1968); *Alphaco, Inc. v. Nelson*, 385 F. 2d 244, 245 (C.A. 7th, 1967); *Munson v. McGinnes*, 283 F. 2d 333, 335-337 (C.A. 3d, 1960), certiorari denied, 364 U.S. 880 (1960); *Towanda Textiles, Inc. v. United States*, 180 F. Supp. 373, 378 (C. Cls. 1960).

As noted above, Congress enacted the predecessor of Section 631(b) in order to put taxpayers who acquire and assign cutting rights, reserving an "economic interest", on an equal footing for tax purposes with timber owners who sell their timber stands outright. If a timber owner constructs access roads and then sells his timber stand, the road costs would

obviously be part of his basis for the purpose of the capital gain computation. Congress could scarcely have intended to confer even greater tax benefits on taxpayers effecting Section 631(b) transactions, by allowing them to expense the road costs against ordinary income.

In support of its decision, the District Court cites *Converse v. Earle* (D. Ore.), decided August 9, 1951 (43 A.F.T.R. 1308), as a case "directly in point", and quotes general language from *Union Bag-Camp Paper Corp. v. United States*, 325 F. 2d 730 (Ct. Cl.). The court's reliance is misplaced.

It appears from the relevant findings in *Converse* (43 A.F.T.R. p. 1310) that the taxpayer did not claim capital gain treatment of his timber income but, rather, reported it as ordinary income from a trade or business. Hence, the ruling that the taxpayer was entitled to expense the costs of access roads is irrelevant to the treatment of such costs in a capital gain computation under Section 631(b). Moreover, if the taxpayer in that case owned the land on which the access roads were constructed, the decision is simply wrong; a taxpayer's costs of effecting permanent improvements or betterments to property he owns are, with irrelevant exceptions, capital expenditures which are non-deductible by statute. See Section 263(a) of the 1954 Code.

Nor is *Union Bag-Camp Paper Corp.* in point. In holding there that the taxpayer's management expenses could be expensed, the court said that (325 F. 2d p. 742, fn. 26) "plaintiff's forest management expenses were incurred primarily in the ordinary conduct of its business, and the record discloses no recognizable part of such expenses to be directly related to timber sales under cutting contracts".

In the case at bar, the costs of constructing the access roads were indeed "directly related" to the transaction and were incurred to produce the gain treated as capital under Section 631(b). Accordingly, Idapine Tenants properly capitalized and amortized those costs. But the costs were improperly expensed; they were part of the "adjusted depletion basis" which, under Section 631(b), were recoverable only by way of offset in the computation of capital gain.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be reversed.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

MEYER ROTHWACKS,
GRANT W. WIPRUD,
DAVID ENGLISH CARMACK,
*Attorneys,
Department of Justice,
Washington, D.C. 20530.*

Of Counsel:

SIDNEY I. LEZAK,
United States Attorney.

NORMAN SEPENUK,
Assistant United States Attorney.

JUNE, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 12th day of June, 1968.

SIDNEY I. LEZAK
United States Attorney.

APPENDIX

*Internal Revenue Code of 1954:*SEC. 611. ALLOWANCE OF DEDUCTION
FOR DEPLETION.

(a) *General Rule.*—In the case of * * * natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion * * *, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary or his delegate. * * *

* * * * *

(26 U.S.C. 1964 ed., Sec. 611.)

SEC. 612. BASIS FOR COST DEPLETION.

Except as otherwise provided in this subchapter, the basis on which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining the gain upon the sale or other disposition of such property.

(26 U.S.C. 1964 ed., Sec. 612.)

SEC. 631. GAIN OR LOSS IN THE CASE OF
TIMBER OR COAL.

* * * * *

(b) *Disposal of Timber With a Retained Economic Interest.*—In the case of the disposal of timber held for more than 6 months before such disposal, by the owner thereof under any form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from the disposal of such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber. * * * For purposes of this subsection, the term “owner” means any person who owns an interest in such timber, including a sublessor and a holder of a contract to cut timber.

* * * * *

(26 U.S.C. 1964 ed., Sec. 631.)

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received

plus the fair market value of the property
(other than money) received. * * *

* * * * *

(26 U.S.C. 1964 ed., Sec. 1001)

SEC. 1011. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses)), adjusted as provided in section 1016.

(26 U.S.C. 1964 ed., Sec. 1011.)

SEC. 1012. BASIS OF PROPERTY—COST.

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses). The cost of real property shall not include any amount in respect of real property taxes which are treated under section 164 (d) as imposed on the taxpayer.

(26 U.S.C. 1964 ed., Sec. 1012.)

SEC. 1016. ADJUSTMENTS TO BASIS.

(a) *General Rule.*—Proper adjustment in respect of the property in all cases be made—

(1) for expenditures, receipts, losses, or other items, properly chargeable to capital account, * * *

* * * * *

(26 U.S.C. 1964 ed., Sec. 1016.)

Treasury Regulations on Income Tax (1954 Code):

§1.611-3 *Rules applicable to timber.*

(a) *Capital recoverable through depletion allowance in case of timber.* In general, the capital remaining in any year recoverable through depletion allowances is the basis provided by section 612 and the regulations thereunder. * * *

(b) *Computation of allowance for depletion of timber for taxable year.* (1) The depletion of timber takes place at the time timber is cut, but the amount of depletion allowable with respect to timber that has been cut may be computed when the quantity of cut timber is first accurately measured in the process of exploitation. * * *

(2) The depletion unit of the timber for a given timber account in a given year shall be the quotient obtained by dividing (i) the basis provided by section 1012 and adjusted as provided by section 1016, of the timber on

hand at the beginning of the year plus the cost of the number of units of timber acquired during the year plus proper additions to capital, by (ii) the total number of units of timber on hand in the given account at the beginning of the year plus the number of units acquired during the year plus (or minus) the number of units required to be added (or deducted) by way of correcting the estimate of the number of units remaining available in the account. * * *

* * * * *

(c) *Timber depletion accounts on books.*

(1) Every taxpayer claiming or expecting to claim a deduction for depletion of timber property shall keep accurate ledger accounts in which shall be recorded the cost or other basis provided by section 1012 of the property and land together with subsequent allowable capital additions in each account and all other adjustments provided by section 1016 and the regulations thereunder.

(2) In such accounts there shall be set up separately the quantity of timber, the quantity of land, and the quantity of other resources, if any, and a proper part of the total cost or value shall be allocated to each after proper provision for immature timber growth. * * *

* * * * *

(26 C.F.R., Sec. 1.611-3.)

§1.612-1 *Basis for allowance of cost depletion*

(a) *In general.* The basis upon which the deduction for cost depletion under Section 611 is to be allowed in respect of any mineral or timber property is the adjusted basis provided in section 1011 for the purpose of determining gain upon the sale or other disposition of such property except as provided in paragraph (b) of this section. The adjusted basis of such property is the cost or other basis determined under section 1012, relating to the basis of property, adjusted as provided in section 1016, relating to adjustments to basis, and the regulations under such sections. In the case of the sale of a part of such property, the unrecovered basis thereof shall be allocated to the part sold and the part retained.

(b) *Special rules.* (1) The basis for cost depletion of mineral or timber property does not include:

(i) Amounts recoverable through depreciation deductions, through deferred expenses, and through deductions other than depletion, and

(ii) The residual value of land and improvements at the end of operations.

In the case of any mineral property the basis for cost depletion does not include amounts representing the cost or value of land for purposes other than mineral production. Furthermore, in the case of certain mineral properties, such basis does not include explora-

tion or development expenditures which are treated under section 615(b) or 616(b) as deferred expenses to be taken into account as deductions on a ratable basis as the units of minerals benefited thereby are produced and sold. However, there shall be included in the basis for cost depletion of oil and gas property the amounts of capitalized drilling and development costs which, as provided in § 1.612-4, are recoverable through depletion deductions. In the case of timber property, the basis for cost depletion does not include amounts representing the cost or value of land.

* * * * *

(26 C.F.R., Sec. 1.612-1)

§1.631-2 Gain or loss upon the disposal of timber under cutting contract.

(a) *In general.* (1) If an owner disposes of timber held for more than six months before such disposal, under any form or type of contract whereby he retains an economic interest in such timber, the disposal shall be considered to be a sale of such timber. The difference between the amounts realized from disposal of such timber in any taxable year and the adjusted basis for depletion thereof shall be considered to be a gain or loss upon the sale of such timber for such year. Such adjusted basis shall be computed in the same manner as provided in section 611 and the regulations thereunder with respect to the allowance for depletion. * * *

* * * * *

(e) *Other rules for application of section.*

(1) Amounts paid by the lessee for timber or the acquisition of timber cutting rights, whether designated as such or as a rental, royalty, or bonus, shall be treated as the cost of timber and constitute part of the lessee's depletable basis of the timber, irrespective of the treatment accorded such payments in the hands of the lessor.

* * * * *

(26 C.F.R., Sec. 1.631-2.)

Rev. Rul. 58-266, 1958-1 Cum. Bull. 520:

* * * * *

Advice has been requested as to the Federal income tax treatment of expenditures which are directly attributable to the disposal of coal or timber under the provisions of section 117(k) (2) of the Internal Revenue Code of 1939.

The taxpayer in this case is a corporation which is the owner and lessor of coal lands. Substantially all of its income is derived from the disposal of coal within the purview of section 117 (k) (2) of the Code. In connection with and directly attributable to the disposal of coal so as to produce the maximum income therefrom, the taxpayer expends substantial amounts for checking the lessee's records for

accounting and billing purposes, for mining engineers to insure that the maximum amount of coal will be mined by modern methods, for supervisory safety measures, etc.

Section 117(k) (2) of the Code, as amended by the Revenue Act of 1951, 65 Stat. 452, 26 U.S.C. 117, provides, in part, as follows:

In the case of the disposal of timber or coal (including lignite), held for more than 6 months prior to such disposal, by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber or coal, the difference between the *amount received* for such timber or coal and the adjusted basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber or coal. Such owner shall not be entitled to the allowance for percentage depletion provided for in section 114 (b) (4) with respect to such coal. * * * (*Italics supplied.*)

The specific question, therefore, is whether the words "amount received," as used in section 117(k) (2) of the Code mean the gross amount received or whether these words are to be interpreted to mean the gross amount reduced by the direct expenses incident to the transaction.

Section 117(k) (2) of the Code was originally added to the Code by section 127(a) of the Revenue Act of 1943, C.B. 1944, 756 at 773, and, as enacted at that time, was applicable only with respect to the disposal of timber.

Senate Report No. 627, 78th Cong., First Session, C.B. 1944, 973 at 993, on the Revenue Act of 1943 states:

Your committee is of the opinion that various timber owners are seriously handicapped under the Federal income and excess profits tax laws. The law discriminates against taxpayers who dispose of timber by cutting it as compared with those who sell timber outright. The income realized from the cutting of timber is now taxed as ordinary income at full income and excess profits tax rates and not at capital gain rates. In short, if the taxpayer cuts his own timber he loses the benefit of the capital gain rate which applies when he sells the same timber outright to another. Similarly, owners who sell their timber on a so-called cutting contract under which the owner retains an economic interest in the property are held to have leased their property and are therefore not accorded under present law capital-gain treatment of any increase in value realized over the depletion basis.

It is apparent that, in the above statement, a comparison was being made of economic income from sale versus economic income from cutting or lease. The impact of income tax upon a taxpayer deriving income from cutting or lease discriminated against such taxpayer as compared with the impact of the lower capital gain rate applicable to a taxpayer deriving income from a sale.

It has been the consistent position of the Internal Revenue Service, in connection with transactions qualifying for capital gain or loss treatment, that selling expenses are treated as an offset to the selling price. I. T. 2305, C.B. V-2, 108 (1926); (*Mrs.*) *E. A. Griffin v. Commissioner*, 19 B. T. A. 1243; *Therese C. Johnson v. Commissioner*, 7 T. C. 465, acquiescence C. B. 1946-2, 3. Since the selling expenses in a sale of a capital asset are considered in arriving at income subject to capital gain tax, it would seem reasonable to give like

consideration to direct expenses in connection with income from leases. In this way the comparison set forth in the above Committee Report would constitute a comparison of like concepts and afford a basis for a sound determination as to a finding of discrimination between similarly situated taxpayers. The fact that selling expenses may be of a recurring nature has been held not to affect their treatment as an adjustment to the selling price. *General Spring Corporation v. Commissioner*, Tax Court Memorandum Opinion, entered July 27, 1953.

Section 112(a) of the Code provides in general that, upon the sale or exchange of property, the entire amount of gain or loss determined under section 111 of the Code shall be recognized. Section 111 of the Code provides, in part:

(a) Computation of Gain or Loss. — The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount Realized.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

There is no essential difference between the words "amounts received" found in section 117(k) (2) of the Code and "money received" as used in section 111. Under section 117(k) (2) since the transaction is considered as though it were a gain or loss upon the sale of

such timber or coal, and under appropriate circumstances, as provided by section 117 (j), gain is considered as long-term capital gain, the direct expenses incident to the transaction should constitute a reduction of the "amount received" in the same manner that selling expenses reduce the sales price.

The words "amounts received" are found in section 117(f) of the Code. Section 117(f) of Code provides:

Retirement of Bonds, Etc.—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes or certificates or other evidence of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

The effect of this section is to convert ordinary income or loss to capital gain or loss, without any reference however to section 117 (j) of the Code. Section 117(f) has been a part of the Code since its enactment in 1939.

In the case of *Edward A. Atlas v. Commissioner*, Tax Court Memorandum Opinion, entered January 27, 1945, two of the questions in issue were whether the taxpayer realized taxable income in 1940 when he surrendered bonds purchased at a discount and whether the gain, if any, is taxable in part as a long-term capital gain. In accordance with the provisions of section 117(f) of the Code, the court held:

We think that the surrender of the \$61,000 bonds, Series M-1184, for the Fort Hubbard Apartments was the equivalent of the retirement of the bonds by the

Bankers Trust Co. The gain to the petitioner upon such transaction was the difference between the cost of the bonds, \$23,430.77, and the stipulated fair market value of the Fort Hubbard Apartments received, \$70,000, less the fees, commissions and expenses amounting to \$1,795.50, or a net gain of \$44,773.73.

"The amount of the gain attributable to each period is the difference between the cost of the bonds acquired in such period and an aliquot portion of the net amount received upon surrender of the bonds, \$70,000 less \$1,795.50, or \$68,204.50."

In the case of a corporation deriving substantially all its income from coal or timber leases, to which section 117(k) (2) of the Code is applicable, the tax relief intended by the Congress in enacting this section would be largely lost if the direct expenses attributable to the lease were not considered in arriving at the gain which would be treated as long-term capital gain. Under such circumstances, the corporation would either derive no tax benefit from these expenses, if the alternative tax under section 117(c) (1) of the Code was applicable, or it would derive no tax benefit under section 117(k) (2) if its direct expenses were so large as to make the alternative tax under section 117(c) (1) inapplicable.

On the other hand, in the case of a corporation realizing appreciable ordinary income, as well as income from section 117(k) (2) leases, if the direct expenses are not considered in arriving at the gain computed under this section, the gross profit from the lease (gross amount received less cost depletion) will be subject to a maximum tax at substantially lower long-term capital gain rates, whereas

the direct expenses will in turn offset the ordinary income subject to the higher corporate normal and surtax rates. There appears to be no basis for concluding that section 117(k) (2) was intended to operate in such a manner as to favor corporations deriving both ordinary income and section 117(k) (2) income as against corporations deriving only section 117(k) (2) income.

Accordingly, it is held that direct expenses incurred in connection with the disposal of coal or timber subject to the provisions of section 117(k) (2) of the Code reduce the amount received for the purpose of computing gain or loss from such disposal of coal or timber. Whether any expense is a "direct expense" is a matter to be determined largely on the strength or persuasiveness of the facts of each particular case and how closely related are the activities in connection with which the expense is incurred to the disposal of the coal or timber.

No. 22730

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

DOROTHY C. REGAN,

Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

FILED

APR 11 1934

WM. B. CUCKLE, CLERK

EUGENE E. FELTZ,
CASEY, PALMER & FELTZ,

711 Corbett Building, Portland, Oregon 97204,
Attorneys for Appellee.

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BRIEF FOR THE APPELLEE

*On Appeal from the Judgment of the United States
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REFERENCES TO RECORD ON APPEAL

In its brief, the appellant has referred to the Record on Appeal containing the original papers filed in the District Court by the symbols I-R. followed by the page number. The appellee has followed this procedure in this brief.

JURISDICTION

This appeal involves federal income taxes for the years 1960, 1961, and 1962 in the total amount of

\$148.70, plus interest (I-R. 21-22). The assessed deficiencies were paid by the taxpayer (I-R. 25). Claims for refund were timely filed on June 7, 1966, with the District Director in Portland, Oregon (I-R. 7-9). Within the time provided by Section 6532 of the Internal Revenue Code of 1954, on November 18, 1966, the taxpayer brought this action in the District Court for recovery of the taxes paid (I-R. 1-9). Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court was entered on November 6, 1967 (I-R. 21-22). The notice of appeal was filed within sixty days thereafter, on January 4, 1968 (I-R. 28). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

The statement of the case as presented by the appellant is correct except in the following particular.

In addition to the right to cut merchantable timber on Forest Service Land, Idapine Tenants also had acquired and owned timber in their own right which they sold to Idapine Mills, Inc. (Pl. Ex. 1, p. 1; I-R. 16).

SUMMARY OF ARGUMENT

Taxpayer was a member of a joint venture known as Idapine Tenants which owned certain timber and timber cutting rights, together with logging equipment and lumber manufacturing and remanufacturing plants and sites. During the years involved said

joint venture sold part of its timber and timber cutting rights to Idapine Mills, Inc. and leased to said corporation its logging equipment and plants. The income of the joint venture on the sale of its timber and timber cutting rights was taxable as capital gains under Section 631(b) of the Internal Revenue Code of 1954, and the rental income was taxable as ordinary income.

In carrying on its business of selling timber and leasing equipment and plants, the joint venture constructed certain access roads on the timber land involved, capitalizing and then amortizing the cost of said roads based upon the quantity of timber sold each year. Said road amortization expense was an ordinary and necessary expense of the joint venture in carrying on its timber sales and rental business, and deductible as such under Section 162 of the Internal Revenue Code of 1954. The District Court in its decision correctly so held. Said decision is supported by all the cases touching upon this issue. Conversely, the contention of the appellant that said road amortization expense is a part of the "adjusted depletion basis" referred to in Section 631(b), thereby reducing the capital gain to the joint venture on the sale of its timber and timber cutting rights, is not supported by either statute, regulation, or case law.

ARGUMENT

The road amortization expenses of the joint venture were ordinary and necessary business expenses of said joint venture and deductible as such under section 162 of the Internal Revenue Code of 1954.

1. *Section 162 of the Internal Revenue Code of 1954 allows as a deduction all the ordinary and necessary expenses paid or incurred in carrying on a trade or business.*

2. *Road amortization expenses are not a part of the "adjusted depletion basis" referred to in Section 631(b) of the Internal Revenue Code of 1954, relating to the computation of the capital gain or loss on the sale of timber or timber cutting rights.*

Under Section 162 of the Internal Revenue Code of 1954, Appendix, *infra*, a trade or business is entitled to deduct all ordinary and necessary expenses paid or incurred in carrying on a trade or business. The Treasury Regulation pertaining to said section, Regulation 1.162-1, amplifies said section by stating in part as follows:

"(a) *In General*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or credit under provisions of law other than Section 162. The cost of goods purchased for resale, with proper adjustment for opening and

closing inventories, is deducted from gross sales in computing gross income. . . .”

Since the joint venture was in the business of selling timber and renting equipment and manufacturing plants, (Pl. Ex. 1, 2 & 3), the taxpayer, as a member of said joint venture, was entitled to deduct from her gross income therefrom all of her share of the expenses relating to said business so long as they were ordinary and necessary, unless they are a part of the “cost of goods purchased for resale.” Appellant does not contend that the road amortization expenses of the joint venture were not ordinary and necessary, but asserts that they are a part of the cost of the timber and timber cutting rights sold by the joint venture.

The case of *Converse v. Earl*, 43 A.F.T.R. 1308 (D.C. Ore., 1951) is directly on point. This case involved payments by the taxpayer for the construction of a logging road on state owned land adjacent to the timber sold by the taxpayer. The Internal Revenue Service, in that case, also contended that the payments for the construction of the logging road constituted capital expenditures and therefore were not deductible as ordinary and necessary business expenses of the taxpayer. The District Court for Oregon held that said logging road expenses of the taxpayer were deductible as ordinary and necessary business expenses.

In a similar case decided by the United States District Court for the District of Oregon, *Watts v.*

Erickson, 10 A.F.T.R. 2d 5832 (1962), the court held that fees paid by the taxpayer for the use of timber roads "constituted ordinary and necessary business expenses" to the taxpayer in the year said expenses were incurred. In that case, the taxpayers were members of a partnership which purchased timber from the U. S. Forest Service, and pursuant to said purchase the partnership also agreed to pay certain logging road use fees. The government contended that said road use fees were not ordinary and necessary business expenses of the taxpayer. Said road use fees are equivalent to the road amortization expenses in this case; they both relate to logging road expenses incurred by a taxpayer in the business of acquiring and selling timber. Certainly, if the road use fees in the *Watts* case were deductible as ordinary and necessary business expenses of the taxpayer, then the road amortization expense of the joint venture in the instant case before the court should also be so deductible.

Appellant's position in this case is that since the logging road expenses were incurred by the joint venture to produce capital gains, said expenses must be used in the computation of those capital gains and not taken as regular business expenses (App. Br. 6, 14). To support this argument, appellant contends that the logging road costs are a part of the "adjusted depletion basis" (adjusted cost basis) referred to in Section 631(b) (App. Br. 6, 14).

"Adjusted depletion basis" or "basis for cost de-

pletion" is defined by Section 612 of the Internal Revenue Code as follows:

"Except as otherwise provided in this subchapter, the basis on which depletion is to be allowed in respect of any property shall be the adjusted basis provided in Section 1011 for the purpose of determining the gain upon the sale or other disposition of such property."

Section 1011 of the Internal Revenue Code, Appendix, *infra*, states that reference must be made to Section 1012 for the purpose of computing basis for determining the gain or loss from the sale or other disposition of property. Said Section 1012 reads in part as follows:

"The basis of property shall be the cost of such property, except as otherwise provided in this subchapter. . . ." (26 U.S.C. 1964 ed., § 1012).

Further light is shed upon the definition of the basis of timber for depletion by Regulation 1.612-1(b) (1) which reads in part as follows:

"(1) The basis for cost depletion of mineral or timber property does not include:

(i) Amounts recoverable through depreciation deductions, through deferred expenses, and through deductions other than depletion, and

(ii) The residual value of land and improvements at the end of operations. . . ."

The last regulation quoted above clearly indicates that road amortization expenses are not to be includ-

ed in the basis of timber for purpose of depletion, and therefore are not included in the adjusted basis of said timber for determining gain or loss under Section 631(b) of the Internal Revenue Code.

Although not specifically involving road amortization expenses, the case of *Drey v. U. S.*, 7 A.F.T.R. 2d 333 (D.C., E. Dis. of Mo., 1960) is very much in point. The government contended in that case that certain expenses of the taxpayer, (cruising of timber areas by employees, marking out the sections ready for cutting, and inspection of cutting to prevent purchasers from getting over lines) constituted direct sales expenses to be used in computing the capital gain to the taxpayer on account of the timber sold. The court in its opinion likened the sale of timber to the sale of any other item of inventory, and stated that it is only by special statute that the sale of timber is treated the same as the sale of a capital asset. Since the taxpayer was in the business of selling timber, all expenses incurred by him arising out of the ordinary course of said business were deductible as ordinary and necessary business expenses and were not to be considered as part of the capital gain computation. As stated by the court:

“In the case at bar it is the Court’s conclusion that the question here presented is whether or not the expenses of the plaintiff arose and occurred in the ordinary course of his business as contemplated in 26 U.S.C., Sec. 162. . . . Here Plaintiff’s expenses arose in the ordinary course of his business. The fact that these expenses are

attributable to the production of income taxable at the capital gain rate does not place them without the ordinary and necessary business expense category. . . ." (p. 337).

The court in the *Drey* case cited with approval the case of *Alabama Land Co. v. Commissioner*, 28 B.T.A. 586, in which case the court held that expenditures for cruising timber were deductible as ordinary and necessary business expenses even though said cruises related to the later sale of said timber. Thus, if cruising timber for purpose of sale is so deductible, no logical reason can be seen why road amortization expenses should not also be deducted as ordinary and necessary business expenses.

The same argument as appellant is making in this case was presented to the Court of Claims in *Union Bag-Camp Paper Corporation v. U. S.*, 325 F.2d 730, 12 A.F.T.R. 2d 6127 (1962). In that case, the taxpayer was in the business of selling timber under cutting contracts with others. The taxpayer deducted on its tax return, as ordinary and necessary business expenses, its total land management expenses which consisted of salaries, depreciation, supplies, repairs, travel, entertainment and insurance. The government contended that part of these expenses should be allocated to the sales of timber and thereby reduce the gain realized from such sales. In rejecting the government's contention, the court reviewed the history of the tax law in this area and found that nowhere in the statutes enacted by Congress did Congress ever

restrict the capital gain relief provision relating to timber sales, "although in its deliberation with the 1954 Code, Congress had considered and rejected proposed legislation prohibiting the deduction of the types of expenditures here at issue . . .". The court concluded its opinion with the following remark which is equally pertinent to the issue now before this court:

" . . . Absent specific language in the statute or regulations so requiring, it should not be held that the taxing authority has with one hand granted a special tax benefit to a natural resource industry, but with the other hand has taken back part of the benefit through the medium of disallowing a deduction to which the taxpayer had previously been entitled." (p. 744)

The case of *Spangler v. Commissioner*, 323 F.2d 913, 12 A.F.T.R.2d 5831, C.A. 9, 1963) and the other cases cited by appellant on page 15 of its brief are not in point. Said cases involved expenses relating to the sale of *capital assets*. However, the deduction of appraisal costs, legal fees, litigation costs and commissions in the sale of *capital assets* (the factual situation in those cases) cannot be likened to the sale of timber, a *non-capital asset*. Appellant in effect contends that all expenses of a timber operator or dealer should be treated no differently than the expenses relating to the sale of capital assets. This same contention was flatly rejected in the case of *Drey v. U.S.*, *supra*, wherein the court stated:

" . . . We cannot glibly equate the disposition of timber with the sale of a capital asset. 26

U.S.C., Sec. 1221, in defining 'capital asset' states that that term does not include '(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer * * * or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;'. A reading of all of the statutes involved leads this Court to the conclusion that timber would not be afforded capital gain treatment except that it is authorized to be treated as such under the theory of a depletion allowance. Therefore, we are not actually dealing with the sale of a capital asset but dealing with the sale of a commodity which is afforded capital gain treatment by statute." (p. 337)

The appellant asserted this same argument in *Union Bag-Camp Paper Corporation v. U. S.*, *supra*. In discussing the tax benefits given to the seller of timber by the Internal Revenue Code, the Court stated:

"... These statutory provisions, designed by Congress 'to afford relief to timber owners,' (*Boeing v. United States*, *supra*, at page 584 of 98 F. Supp. at p. 25 of 121 Ct. Cl.) contain nothing which on any normal reading would prohibit the deduction by a timber dealer from income of his ordinary and necessary expenses incurred in the growing or selling of his timber, or which would require him to offset such expenses against capital gains realized on timber sale or disposals." (p. 743)

Appellant's resort to Rev. Rul. 58-266, 1958-1 Cum. Bull. 520 is of no avail. Although using the

phrase "coal or timber" in said ruling, the factual situation giving rise to the ruling involved a taxpayer who was in the business of selling *coal*, not timber. As restricted to coal, said ruling is supported by Section 272 of the Code enacted in 1954. The court in the *Union Bag* case, *supra*, pointed out that when Section 272 was being considered by Congress in 1954, said section originally referred to both coal and timber, but "the Senate Finance Committee eliminated this provision with respect to timber, and the Senate's action was accepted by the Conference Committee. S. Rept. No. 1622, 83d Cong., 2d Sess., p. 229 (1954); H. Rept. No. 2543, 83d Cong., 2d Sess. p. 33 (1954)." The Court then proceeded to point out that as applied to timber Rev. Rul. 58-266 is not supported by statute or long standing regulation:

"A fortiori, in the area of the present dispute, no longstanding regulation, or even a fluctuating one, has prohibited the deductions sought. Instead, with respect to the question here involved, the applicable regulations have been entirely silent and have merely repeated the language of the parent statute, Section 117 (k)(2). See Treas. Reg. 111, sec. 29.117-8(b) and Treas. Reg. 118, sec. 39-117(k)(1)(b). It was not until 1958, when Rev. Rul. 58-266, *supra*, was issued that administration action in this field was taken. Meanwhile, as pointed out above, in its deliberations on the 1954 Code, Congress had considered and rejected proposed legislation prohibiting the deduction of the type of expenditures here at issue. From the foregoing, it is clear that plaintiff should not be required to offset against cutting

contract proceeds any part of its forest management expense *even if it be assumed that, as a practical matter, some portion thereof could be singled out as selling expense. . . .*" (p. 743) (emphasis added)

In a later case involving the same taxpayer, *Union Bag-Camp Paper Corp. v. U. S.*, 366 F.2d 1011, 18 A.F.T.R.2d 5758, (Ct. Cl. 1966), the Court followed the principles laid down in the prior case and *rejected* the government's contention that 1) annual payments by the taxpayer for use of timber lands and 2) portions of its management expense must be included in the acquisition cost of the timber involved or allocable to the cost of the timber sold. It should be noted that in footnote 6 of the opinion, reference was made to the fact that the taxpayer was entitled to build and maintain roads on the land involved.

In accord is the recent case of *Ransburg v. U. S.*, 281 F. Supp. 324, 21 A.F.T.R.2d 560 (D.C. Ind., 1967), involving expenses for pruning and shearing Christmas trees, the sales of which are entitled to capital gains treatment the same as timber under Section 631. After reviewing in detail the legislative history relating to the special tax benefits granted by Congress to timber owners, the court held that said expenses were deductible as ordinary and necessary business expenses under Section 162. As stated by the court:

"Prior to the year 1944, a taxpayer engaged in the business of raising and selling timber was required to report the proceeds of timber sales

as ordinary income and was entitled to deduct all ordinary and necessary expense attributable to such sales under Title 26 U.S.C.A. Section 23(a) (1939 Internal Revenue Code). The Revenue Act of 1943 (58 Stat. 46) amended the 1939 Internal Revenue Code by adding Sections 117(k)(1) and (2). Title 26 U.S.C.A. Section 117(k)(1) and (2) (1939 Internal Revenue Code.) Thereafter, such taxpayer could elect to proceed as he did before the amendment with respect to reporting sales as ordinary income, or to utilize the amendment by reporting the sales as capital gains. The amendment was made to relieve timber owners and there was no express prohibition of the deduction by a taxpayer from income of his ordinary and necessary expenses incurred in growing or selling of his timber, or express provision which would require him to offset such expenses against capital gains realized on timber sales." (p. 326)

CONCLUSION

No statute, long standing regulation of the Internal Revenue Service or case law can be found supporting the appellant's contention that logging road expenses can not be deducted as an ordinary and necessary business expense. On the contrary, in all the cases that have either directly or indirectly touched upon this subject, the courts have consistently held that logging road expenses or like expenses are properly so deductible. The District Court correctly so held.

Therefore, the judgment of the District Court should be affirmed.

Respectfully submitted,

EUGENE E. FELTZ
CASEY, PALMER & FELTZ
Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 9th day of August, 1968.

EUGENE E. FELTZ
Attorney for Appellee.

APPENDIX

Internal Revenue Code of 1954:

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * *

* * * * *

(26 U.S.C. 1964 ed., Sec. 162)

SEC. 272. DISPOSAL OF COAL OR DOMESTIC IRON ORE.

Where the disposal of coal or iron ore is covered by section 631, no deduction shall be allowed for expenditures attributable to the making and administering of the contract under which such disposition occurs and to the preservation of the economic interest retained under such contract, except that if in any taxable year such expenditures plus the adjusted depletion basis of the coal or iron ore disposed of in such taxable year exceed the amount realized under such contract, such excess, to the extent not availed of as a reduction of gain under section 1231, shall be a loss deductible under section 165(a). This section shall not apply to any taxable year during which there is no income under the contract.

* * * * *

(26 U.S.C. 1964 ed., Sec. 272.)

SEC. 631. GAIN OR LOSS IN THE CASE OF TIMBER OR COAL.

(a) Disposal of Timber With a Retained Eco-

nomic Interest.—In the case of the disposal of timber held for more than 6 months before any such disposal, by the owner thereof under any form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from the disposal of such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber. * * * For purposes of this subsection, the term “owner” means any person who owns an interest in such timber, including a sublessor and a holder of a contract to cut timber.

* * * * *

(26 U.S.C. 1964 ed., Sec. 631.)

SEC. 1011. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

The adjusted basis for determining gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses)), adjusted as provided in section 1016.

* * * * *

(26 U.S.C. 1964 ed., Sec. 1011).

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
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WM. MATTHEW BYRNE, JR.

United States Attorney

ROBERT L. BROGIO

Assistant U.S. Attorney

Chief, Criminal Division

MICHAEL D. NASATIR

Assistant U.S. Attorney

1200 U.S. Court House
312 North Spring Street
Los Angeles, California 90012
Telephone: 688-2417

Attorneys for Appellee,
United States of America

FILED

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MICHAEL D. NASATIR
Assistant U.S. Attorney

1200 U.S. Court House
312 North Spring Street
Los Angeles, California 90012
Telephone: 688-2417

Attorneys for Appellee,
United States of America

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY L. WARD,

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATUTE INVOLVED

Title 21, United States Code, Section 176(a), provides
in pertinent part as follows:

" . . . whoever, knowingly, with intent to
defraud the United States, . . . receives, conceals,
buys, sells, or in any manner facilitates the trans-
portation, or sale of such marihuana after being
imported or brought in, knowing the same to have
been imported or brought into the United States
contrary to law . . . shall be imprisoned not less
than five or more than twenty years and, in addition,

may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

II

STATEMENT OF THE CASE

On August 21, 1967, at approximately 11:00 p.m., Federal Narcotics Agent Lusardi met co-defendant Brooks Miser at Holmes and Slauson Streets in Los Angeles [R. T. 43, 48].^{1/} Agent Lusardi was accompanied by Federal Narcotics Agent Walker [R. T. 78]; also present was Thyron Mertz, an informant. Agents Lusardi and Walker, and Miser and Mertz then proceeded to 6513 Holmes Street in Los Angeles [R. T. 43, 54, 65, 78].

Agent Lusardi and Mr. Miser went to the resident at the above address and knocked on the door [R. T. 43, 55]. The door was opened by a man later identified as defendant Orlando Louis Duran [R. T. 43-44, 79]. Agent Lusardi was introduced to defendant Duran and defendant Terry Lawrence Ward. [R. T. 44, 57].

^{1/} "R. T." refers to Reporter's Transcript.

Mr. Miser then spoke directly to defendant Ward. It appeared to Agent Lusardi that Miser knew only defendant Ward or knew him better than defendant Duran [R. T. 65].

Agent Lusardi asked defendant Ward if he had the marihuana and if he was ready to do business. Defendant Ward stated he did have the marihuana and instructed Agent Lusardi to drive his car to the rear of the house so it could be loaded [R. T. 44, 57].

Agent Lusardi asked defendant Ward if it would be possible to see the marihuana before turning over the money [R. T. 44]. Agent Lusardi, defendants Ward and Duran, and Miser then went into the rear yard behind the house [R. T. 44-45, 57-58]. They approached Ward's 1967 Volkswagen parked in the rear yard [R. T. 44, 45, 67]. At defendant Duran's instruction defendant Ward unlocked the trunk whereupon agent Lusardi observed and examined a large number of kilograms of marihuana located inside [R. T. 45, 58, 66-67]. Defendant Duran asked the agent if he wanted to take a closer look at the marihuana and told him he could take 2 or 3 of the kilos into the house and look at them in the light [R. T. 45]. Lusardi advised him that the marihuana looked good and that he was satisfied [R. T. 45].

Agent Lusardi asked defendant Duran if there were 50 kilograms in the trunk. Duran stated there were 46 in the trunk and 14 more in the garage [R. T. 45-46]. Defendant Ward told Duran to open the garage and show the agent the other kilos [R. T. 46]. Defendant Duran told Lusardi that the kilos in the garage were wrapped differently because they had opened them up

to ascertain whether the marihuana had been either "sugared or honeyed down" [R. T. 46]. Defendant Duran then unlocked and opened the garage door [R. T. 46, 70]. In the garage Agent Lusardi examined a box containing approximately 14 kilograms of marihuana. He then told defendants Ward and Duran he was satisfied and would get his partner and load the marihuana into his vehicle [R. T. 46].

Agent Lusardi and Miser then returned to the government car. Agent Lusardi told Agent Walker he had seen the marihuana and told him to drive to the backyard. Agent Walker drove up the driveway where defendant Duran instructed him to back his car next to the Volkswagen and to shut off the lights of his vehicle [R. T. 79]. Agent Lusardi then placed Miser under arrest, while Agent Walker placed defendant Duran and defendant Ward under arrest [R. T. 47-48, 60-62, 79].

III

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO
SHOW THAT WARD WAS IN POSSESSION
OF THE MARIHUANA CHARGED IN
COUNT I OF THE INDICTMENT.

Section 176(a), Title 21, United States Code, provides that proof of possession of marihuana is sufficient evidence to authorized conviction unless that possession is explained to the satisfaction of the jury.

"Possession" sufficient to support the inference of importation and knowledge provided in Section 176(a) of Title 21, United States Code, means having marihuana under one's dominion and control to such a degree as to have the power of disposal. Such possession can be constructive and need not be exclusive, but may be joint.

Rodella v. United States, 286 F.2d 306, 311

(9 Cir. 1960), cert. den. 365 U.S. 889 (1961);

Dolliver v. United States, 379 F.2d 307

(9th Cir. 1967).

Actual or constructive possession may be proved by circumstantial evidence.

Cellino v. United States, 276 F.2d 941

(9th Cir. 1960).

There is no doubt that Agent Lusardi spoke to defendant Ward at the outset of the negotiations. Both on direct and cross-examination, Lusardi stated that he first discussed the impending transaction with Ward. During this discussion Ward stated that he had the marihuana and instructed Lusardi as to the procedure to be followed for the transfer of that marihuana [R. T. 44, 57]. Such conversation provides the trier of facts with competent circumstantial evidence of dominion and control.

Cellino, supra, at p. 947;

Dolliver, supra.

Moreover, the marihuana charged in Count I was in defendant Ward's car which he opened with his key in order to allow Lusardi

to inspect it. [R. T. 45, 47, 67]. As stated in Evans v. United States, 257 F.2d 121, 128 (9th Cir. 1958) cited in appellant's brief at p. 9:

"Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics and control thereof. "

Ward's dominion and control of the marihuana is shown by his negotiation for the transfer of the marihuana and by its presence in his vehicle. Use of his key was necessary to display the contraband. He had the ability to drive away with it if he so desired. However, his conversation with Lusardi at the outset of the transaction indicated that his desire was to sell the marihuana, which he clearly had both the intention and power to do. This dominion and control was such as to give him the power of disposal of the contraband and therefore constituted possession, either actual or constructive.

Rodella v. United States, supra, at 11. 311, 312;

Cellino v. United States, supra.

This case is distinguishable from the facts in both Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962) and Delgado v. United States, 327 F.2d 641 (9th Cir. 1962) cited in appellant's brief at pages 5 and 7. In Delgado there was no evidence presented other than the fact that marihuana was found

in the drawer of a nightstand at the foot of a bed occupied by the defendant and co-defendant. The defendant in Arrellanes was the wife of the co-defendant. Her presence where narcotics were found was coincidental with the presence of her husband and could be explained by her attachment to him. Her statement to the other passenger in the car concerning her "sitting on fifty pounds of weed" was made after arrest and after a disclosure of marihuana in the car had been made to everyone present.

Arrellanes, supra, at p. 606. Moreover, her husband had complete direction and control over the automobile where the contraband was found, indicating that he had exclusive possession of the hidden contents. *Id.* at p. 606.

B. THE EVIDENCE IS SUFFICIENT TO
SHOW THAT WARD WAS IN POSSESSION
OF THE MARIHUANA CHARGED IN
COUNT II OF THE INDICTMENT.

Count II of the indictment involves the 14 kilograms of marihuana located in the garage [R. T. 47]. The evidence shows that Ward had joint constructive possession along with co-defendant Duran. The indictment, although stated in two counts, describes essentially one transaction. Defendant Ward conducted negotiations with the agent for the entire amount of marihuana. In the discussions defendant Ward at no time distinguished between the marihuana located in the garage and the marihuana in the trunk of the car.

While in the backyard with full knowledge of the presence of marihuana in the garage, Defendant Ward instructed Duran to open the garage door, the inference being that the sale could then be consummated. Duran complied with this direction. The negotiations, coupled with the order to display the 14 kilograms in the garage, show that Ward had both the intent and the power to jointly dispose of this marihuana with Duran, and therefore that he was in constructive possession of it. At least reasonable minds could, and did, so conclude.

Klepper v. United States, 331 F.2d 694

(9th Cir. 1964);

Rodella, supra, at p. 311;

Cellino, supra.

CONCLUSION

From the foregoing facts it can be seen that there was ample evidence, taking the view most favorable to the government, for reasonable minds to conclude that defendant was in possession of the marihuana involved in both counts. Therefore, the verdict of the jury as the sole triers of fact must be sustained.

Fraker v. United States, 294 F.2d 859, 861
(9th Cir. 1961).

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Division

MICHAEL D. NASATIR
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America

NO. 22733 ✓

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 21 1989

SYDNEY N. FLOERSHEIM, an individual
trading and doing business as
FLOERSHEIM SALES COMPANY and NATIONAL
RESEARCH COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW ORDER OF THE
FEDERAL TRADE COMMISSION

PETITIONER'S OPENING BRIEF

MURRAY M. CHOTINER
833 Dover Drive
Suite 6
Newport Beach, California

Attorney for Petitioner

FILED

JAN 6 1989

WM. B. LUCK, JR.

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I

There are no "deceptive acts or practices in commerce" in the sale or use of the forms and materials sold by Respondent and therefore such sales do not violate Section 5 of the Federal Trade Commission Act. 8

A. The facts of this case as presented to the Hearing Examiner show beyond a doubt that the forms and materials produced by Respondent do not have the capacity or the effect of deceiving either the purchasers or the persons to whom the forms are sent by the purchasers into a belief that such forms come from the federal government. 8

B. There is no "deception in commerce" because, first, "deception" requires injury and there is no injury to anyone in this instance, and, second, even assuming there is "deception" in the use of Respondent's forms such use is not in "commerce". 18

II

The Order issued by the Federal Trade Commission in this case is unreasonable, arbitrary and capricious and is thus a denial of the due process guaranteed Respondent by the Fifth Amendment to the United States Constitution. 20

III

The Federal Trade Commission exceeded its

jurisdiction in making an order in this case which goes far beyond that which is necessary to prevent "deception in commerce".

27

IV

The issue of third party authority was not raised by the complaint in that there was no mention that Respondent had committed any acts from which an inference could be drawn that debts had been referred to anyone for collection.

31

V

The Commission is bound by its own Rules of Practice and those rules require that the Commission reopen proceedings to question conduct which was the subject of those prior proceedings.

34

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Respondent.

PETITION TO REVIEW ORDER OF THE
FEDERAL TRADE COMMISSION

PETITIONER'S OPENING BRIEF

ISSUES PRESENTED

1. Do the forms and materials used by petitioner violate Section 5 of the Federal Trade Commission Act?
2. Is the order issued by the Federal Trade Commission in this case unreasonable, arbitrary and capricious and thus a denial of substantive due process guaranteed by the Fifth Amendment of the Constitution of the United States?

3. Has the Federal Trade Commission exceeded its jurisdiction in making an order which goes well beyond that which is necessary to prevent any "deception in commerce" as prohibited in Section 5 of the Federal Trade Commission Act?
4. Is the issue of third party authority -- "conveying the inference that a debt has been referred to someone for collection when that is not true" -- raised in the complaint when there is no mention in the complaint that there have been any actions from which an inference could be drawn that debts have been referred to anyone for collection?
5. Is the Federal Trade Commission required to follow its own Rules of Practice and reopen proceedings rather than issue a new complaint as it did in the present case?

STATEMENT OF CASE

On October 11, 1954, the Federal Trade Commission issued a complaint against Mitchell S. Mohr and Sydney Floersheim (petitioner herein and respondent below) alleging that certain forms published by Mohr and sold by Floersheim were deceptive. On June 1, 1956, the Commission issued an order which was affirmed by this court.

In November, 1962, the Federal Trade Commission filed a petition in this court for the institution of prosecution for criminal contempt for violating the terms of the order.

This court found that the petitioner was not guilty of criminal contempt.

On November 7, 1966, the Federal Trade Commission issued the complaint in the present action. After a hearing before the Hearing Examiner, Joseph W. Kaufman, an Initial Decision was rendered by the Examiner on June 2, 1967. There were cross appeals from the Initial Decision by the counsel supporting the complaint and by the respondent (petitioner herein) to the Federal Trade Commission. On February 5, 1968, the Federal Trade Commission issued its order in which it partially sustained and partially reversed the Initial Decision by the Hearing Examiner. This is a petition to review that order of the Federal Trade Commission.

STATEMENT OF FACTS

Respondent (petitioner herein) has been associated with or affiliated with National Research Company and Floersheim Sales Company since approximately 1953. Floersheim Sales Company has been the exclusive sales agent for National Research Company since 1953. (R.T. 290, 15-24)

National Research Company was first organized in 1953 and was owned by Mitchell S. Mohr. Mr. Mohr does not have any connection with National Research Company at the present time and his interest was acquired in 1961 by Mr. Floersheim. (R.T. 291, 1-20)

Through these businesses, National Research Company

and Floersheim Sales Company, respondent is engaged in the business of preparing and selling printed forms and other material for use in obtaining information about alleged delinquent debtors and in the collection of delinquent accounts. Respondent causes the printed forms and other material, when sold, to be transported from his place of business, either in the State of California or in the District of Columbia, to purchasers who are located in various states in the United States. These printed forms and other material are sold to collection agencies, finance and loan companies, merchants who sell on installment accounts, and others who have unpaid accounts. Such purchasers use the forms and material for the purpose (A) of locating delinquent debtors whose present whereabouts is unknown or locating their places of employment, or (B) assisting in the collection of delinquent accounts by informing debtors to pay their unpaid obligations to their creditors by making payment directly to the creditors. (C.T. 91-92) (This represents the facts as they were found to exist by the Hearing Examiner.)

The forms sold by respondent which are used to obtain information as to debtors (commonly called "skip-tracer" forms) are forms which have been printed in IBM cards. There are several different types of these forms, depending on the kind of information sought. These skip-tracer forms are mailed to the debtors in brown window envelopes

and are accompanied by smaller business reply envelopes carrying a printed first class mail permit number, making a postage stamp on the return envelope unnecessary. The return envelopes carry one of the following printed names or designations as addressee: "Claimants Information Questionnaire", "Current Employment Records", or "Change of Address". In addition to one of the preceeding designations, the return envelope also has respondent's mailing address: 748 Washington Blvd., Washington 5, D.C.

In addition, the skip-tracer forms include a list of instructions for filling out such forms, and in this list of instructions is printed the "Disclaimer" which is required by the Commission's order issued June 1, 1956. This "Disclaimer" makes it very clear that the purpose of the form is "to obtain information concerning a delinquent debtor and to further advise that this is not connected in any way with the United States Government." (C.T. 95 and 141-142)

The remaining forms subject to the Commission's order herein, are the "payment demand" forms which simply demand that the debtor pay his debt to the person designated on the form within a specified period of time. The "payment demand" forms are printed on standard IBM cards and are mailed to the debtors in brown window envelopes. (C.T. 102)

Washington, D.C., has been the main office of National

Research Company since its inception, a bank account was established there, licenses were obtained there and taxes paid there. (R.T. 297, 17-24)

The determination to open the office in Washington, D.C., was arrived at on the following basis: The laws of all states were checked with reference to collection licensing acts as Mr. Mohr was not sure whether they would be in the collection business; it was decided that Washington, D.C., was the best from the standpoint of law uniformity; a national organization was needed because most of the business would be done on the East Coast as the larger concerns had their home offices on the East Coast; and since there is a state jealousy, Washington, D.C., was the most logical spot. Respondent participated in the decision. (R.T. 296, 20 to R.T. 297, 16) There are several reasons why the office of National Research Company is still maintained in Washington, D.C., even though Mr. Mohr is no longer connected with it: fourteen (14) years of using the name "National Research Company" at the same address has created very valuable good will from a business standpoint; it is a national concern; two-thirds (2/3) of the business is done East of the Mississippi. (R.T. 300, 4-19)

The Washington, D.C., building address is the actual address of National Research Company and the names used by National Research Company. The same address has been used for fourteen (14) years with the exception of a room change

when larger quarters were needed. (R.T. 303, 16 to R.T. 304, 5)

The names of the skip-tracer forms used by the respondent were left with the postal authorities and the ones in use were acceptable to the Post Office. "Change of Address", "Current Employment Records", and "Claimant Information Questionnaire" were all listed with the Post Office Department. This was done because a business reply envelope was used. (R.T. 305, 3 to R.T. 306, 6)

The brown envelopes, used to mail the forms to the debtors and to return the forms to respondent when the skip-tracer forms are mailed, are used because they are the cheapest envelope made. (R.T. 306, 16 to R.T. 307, 9)

Respondent uses meter mail or a regular postage stamp. It is a service rendered to the customers and they have their choice of using the meter service or the stamp. (R. T. 308, 3-19) The use of stamps was more or less exclusive at the beginning of the business and now the meter machine is used primarily. (R.T. 312, 14 to R.T. 313, 12) Respondent does not claim to have any interest in the actual collection of any debts shown on any of the forms, and no representation is made to anyone that it does have any interest in the debt. (R.T. 311, 24 to R.T. 312, 13)

ARGUMENT

I

THERE ARE NO "DECEPTIVE ACTS OR PRACTICES IN COMMERCE" IN THE SALE OR USE OF THE FORMS AND MATERIALS SOLD BY RESPONDENT AND THEREFORE SUCH SALES DO NOT VIOLATE SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT.

The language of Section 5 of the Federal Trade Commission Act (15 USCA 45) is simple and clear: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." It is respondent's contentions that first, there is no deception at all either in the sale or use of the materials and forms produced by respondent is not in "commerce" and therefore is outside the jurisdiction of the Federal Trade Commission.

A. THE FACTS OF THIS CASE AS PRESENTED TO THE HEARING EXAMINER SHOW BEYOND A DOUBT THAT THE FORMS AND MATERIALS PRODUCED BY RESPONDENT DO NOT HAVE THE CAPACITY OR THE EFFECT OF DECEIVING EITHER THE PURCHASERS OR THE PERSONS TO WHOM THE FORMS ARE SENT BY THE PURCHASERS INTO A BELIEF THAT SUCH FORMS COME FROM THE FEDERAL GOVERNMENT.

The evidence introduced to the Hearing Examiner of the Federal Trade Commission, and relied upon by the Commission in its Order, consists of the following: The forms and materials themselves; the testimony of persons who received some of the forms from the respondent's purchasers; and certain "expert" testimony of several attorneys.

The forms and other materials which are the subject of the Federal Trade Commission Order in this case are made available to the court for examination as exhibits. Exhibits 5 through 25 are "Payment Demand" forms and envelopes and Exhibits 27 through 36 are "Skip-Tracer" forms and envelopes.

After carefully observing and examining the forms and materials and after hearing all the testimony, the Hearing Examiner concluded that in the cases of both the "Skip-Tracer" and "Payment Demand" forms and materials, it was simply the use of the brown window envelopes by creditors to enclose the forms which simulated an official or governmental origin and thus simulated that the forms were of the same origin. (C.T. 93-95 and C.T. 102; see also C.T. 117 where the Hearing Examiner states that: "... in the present proceeding the examiner finds that the primary unfair or deceptive practice of respondent relates to the envelope in which the form is received by the recipient.")

With reference to the use of brown window envelopes, it is important to note that many businesses use brown

window envelopes because brown envelopes are the least expensive, and window envelopes save much money in that the name and address of the addressee need only be typed once. It should also be noted, that any envelope used by Respondent carries either a postage stamp or is metered; government envelopes are free of any kind of postage and a statement to that effect is conspicuous on the face of a government envelope; and the color of the envelopes used by Respondent are a different color brown than those used by the government. In short, there is nothing on the envelope which would give anyone the impression that the material inside came from the federal government.

The Commission maintains that the use of Respondent's return address on the brown window envelopes along with the use of different colors on the forms inside gives the immediate impression that the envelope comes from the federal government. (C.T. 251) However, even assuming that a recipient of an envelope mailed by Respondent would think when first looking at it that it came from the government, that impression is immediately erased when the contents are noted after opening the envelope.

As can easily be seen, the "Skip-Tracer" forms have printed on them instructions to the addressee as to the proper method of filling out the forms. Included in these instructions is an unambiguous disclaimer which was required by the Commission's prior order under the previous

complaint, and the disclaimer sets forth the exact wording of that order: "The purpose of this card is to obtain information concerning a delinquent debtor and to further advise that this is not connected in any way with the United States Government." The Federal Trade Commission readily acknowledges that this disclaimer exists on every Skip-Tracer form produced by respondent, however, the Commission claims that the size of the print of the disclaimer is too small. (C.T. 252) In addition, the Commission maintains that the designations used for the Skip-Tracer forms are too "official sounding". (C.T. 96 and C.T. 251-252)

Respondent has done everything that could reasonably be expected of him to show that the forms known as "Payment Demand" state exactly what they purport to state, to wit: it tells the debtor to go to its creditor and pay the bill owing to the creditor. In addition, it merely states that the notice comes from "Payment Demand" in Washington, D.C. The Hearing Examiner acknowledged the fact that the form itself is clear as to its purpose in his finding No. 27 of the Initial Decision wherein he states in reference to the "Payment Demand" forms and materials: "The forms themselves do, to be sure, in large measure but not entirely, tend to dissipate the simulation." (C.T. 102) He also acknowledged this when he stated, "... respondent does not create unlawful simulation of governmental

documents or authority through his collection forms ('Payment Demand') as such. This is because they plainly reveal a private indebtedness and a simple demand for payment." (C.T. 123)

The fact that any governmental simulation created by the envelopes is erased by their contents is borne out by the Hearing Examiner's findings: as to the "Payment Demand" forms, the examiner states, "The forms themselves do, to be sure, in large measure, but not entirely, tend to dissipate the simulation." (C.T. 102) "-- However, these collection forms definitely do not produce the simulation in question by themselves, i.e., apart from their being used together with the brown window envelopes in which they are mailed." (C.T. 121) And as to the "Skip-Tracer" forms, the Examiner first states in reference to the designations used by respondent on such forms:

"The Examiner's further conclusion is that the said names or designations are not fictitious, i.e. in any realistic sense for the purpose of proving misrepresentation. Respondent testified (TR 305-06), and the Examiner believes, that the Post Office cleared the use of the names or designations used on return envelopes. It would be difficult for the Examiner to conclude that the Post Office approved the use of 'fictitious names.' Actually the names are realistic and functional. Although

they are not registered tradenames (TR 69), and simply were adopted for the purposes of the business (id), this does not make them deceptive. Moreover, the charge of using 'fictitious' names goes far beyond the basic and repeated charge in the complaint as to the governmental or official origin.

"With the foregoing conclusions, it will be possible to consider, later in this decision, whether any order which issues in this case may properly permit the use of these names or descriptions, provided that there is a radical change in the brown window envelopes, by way of color or otherwise." (C.T. 96-97)

It is of interest to note at this point, that the order of the Hearing Examiner did not prohibit the use by Respondent of the designations.

In addition, the "Skip-Tracer" forms have printed thereon a statement disclosing that the purpose of the form is to obtain information concerning a delinquent debtor and not connected in any way with the United States Government. This statement is there for every recipient to read. However, the Examiner held that the disclaimer statement is "printed in such small type and is so inconspicuous that it is likely to be unnoticed by the recipient, particularly if uneducated." (C.T. 98)

All of these findings, including the finding that the disclaimer on the "Skip-Tracer" forms is too small and inconspicuous, should be considered in light of this Court's opinion in the case of IN RE SYDNEY FLOERSHEIM, No. 18313, decided April 18, 1963 (315 Fed.2d 423) which was the contempt hearing instituted by the Federal Trade Commission against Respondent for the claimed non-compliance with this Court's order regarding the "Skip-Tracer" forms. The only forms and materials now produced by Respondent which were not before this Court in the two prior cases is what is referred to as the "Payment Demand" forms. This Court expressed itself very clearly in that decision:

"We cannot assume that which is expressed in plain English language on any form sent to any literate recipient in this Country would not be read, or not be understood. If that were true, no notice of any kind would be sufficient. It may be difficult to make the American public heed or read a printed statement of fact, but it is there so that all who look and read may know. It is in smaller print than some other words, but in the same size print as many others. In using this language, the respondent did exactly what the Federal Trade Commission in its order asked him to do. ..."

The Hearing Examiner considered this Court's opinion

in rendering his Initial Decision (C.T. 116-119 and 131); and although Respondent challenges the Examiner's interpretation of some of the opinion, it can at least be said that he considered this Court's opinion. The Federal Trade Commission, however, in its order completely dismisses that opinion as "clearly distinguishable." (C.T. 261) In spite of the fact that the issue before this Court in that case was whether or not Respondent was violating its prior order, the validity of what was stated there is not made erroneous.

If a person who receives one of the forms produced by Respondent can read -- that is, if he is "literate" -- then the disclaimer is on the "Skip-Tracer" form for him to read, and the "Payment Demand" forms merely refer him to his creditor. In either event, if the person is literate, the words are there to be read. The disclaimer is listed with the instructions on the form and it is in as large a print as anything on the form except the form designation and the word "NOTICE" over the instructions -- and in some instances Respondent's return address.

If, however, the forms are mailed to a person who is not literate -- that is one who can't read or if he can read a little he can't understand all of what he reads -- such a person will not be "deceived" into believing as the Commission claims. The reason -- he can't read so he will have to take the form to someone who can read or who can explain the form to him. Such a person will not go

to another illerate person, but he will go to one who can read and explain the form.

The validity of this assumption is well established by the witnesses called by the Commission to testify before the Hearing Examiner:

(1) Mrs. Mary Mossberg testified that she received a "change of address" form. (R.T. 100, 18-20) She thought the envelope had something to do with it coming from the income tax people. (R.T. 102, 8-9; R.T. 104, 11-13 and 16-20) However, she also testified that when she opened the envelope, she did not think it came from the income tax people. (R.T. 108, 25 to 109, 5)

(2) Mrs. Elida Gonzalez testified that she received one of the forms produced by Respondent and that she thought that it came from the government. (R.T. 221, 8-21) However, she further testified that she knew she did not owe the United States Government any money and that after she had opened the letter she knew that it was the same bill that Heritage Company (the creditor) had tried to collect from her. She stated that the card said to pay the bill to Heritage or some collection agency. (R.T. 225, 20 to 226, 2)

(3) Mrs. Miller --- Mr. Donald Haynes testified that Mrs. Miller received one of the forms produced by Respondent and that she brought it to him. (R.T. 143, 8-11) However, Mrs. Miller came to her own conclusion that the form had

come from a collection agency. (R.T. 158, 6-13)

(4) Mr. Manuel Gonzalez testified that he too had received one of the forms produced by Respondent, and that he thought the form came from the government. (R.T. 143, 8-11; 144, 1-6) However, it would appear from the record that Mr. Gonzalez is one of those who is not literate. (R.T. 193 to 204) His sole reason for thinking that the form was from the government seems to have been because it was mailed from Washington, D.C. (R.T. 195, 25 to 199, 5) However, because he could not read and did not understand what the form meant, Mr. Gonzalez went to see someone who could explain it to him. Mr. Donald Haynes, an attorney with the California Rural Legal Assistance, testified that Mr. Gonzalez brought the form to him and Mr. Haynes explained to him that it was not a claim from the government. (R.T. 148, 16-20)

(5) Mr. Richard Blackly testified that he was a school teacher and that he had received some of the forms produced by Respondent. (R.T. 232, 24-25; 233, 20-22) He stated that before he opened the envelope he thought it was a G.I. insurance dividend check -- it was the envelope's general appearance which made him think that it was from the United States Government. (R.T. 234, 11-13; 238, 15-23) After opening the envelope, however, he was completely satisfied that the letter was a request or a demand to pay a bill. (R.T. 237, 13-25) He knew that the letter was

from one of his creditors -- the United States Exchange Corporation. (R.T. 237, 13-25; 242, 23 to 243, 6)

Thus, it is evident that the forms produced and sold by Respondent have neither the capacity nor the effect of "deceiving" anyone that they come from the United States Government.

B. THERE IS NO "DECEPTION IN COMMERCE"
BECAUSE, FIRST, "DECEPTION" REQUIRES
INJURY AND THERE IS NO INJURY TO ANYONE
IN THIS INSTANCE, AND, SECOND, EVEN
ASSUMING THERE IS "DECEPTION" IN THE
USE OF RESPONDENT'S FORMS SUCH USE IS
NOT IN "COMMERCE."

"Deceit" is defined as, "A fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon." Black's Law Dictionary, 3rd Ed., 493; see also PAIN v. KIEL, 288 Fed. 527, 529. Thus, it is clear that "deceit" requires damage or injury to someone. The Federal Trade Commission has never shown how anyone has been damaged or injured by the use of Respondent's forms. Every form sent out is either sent to a person who has an acknowledged debt (Mr. Gonzalez - R.T. 144, 1-6; Mrs. Miller - R.T. 158, 6-13; Mrs. Gonzalez - R.T. 223, 12-15; and Mr. Blackly - R.T. 237, 13-25) or it is sent to someone

else as a means of reaching one who has an acknowledged debt. Therefore, no one is "tricked" into any situation in which they are damaged.

In spite of this fact, and even assuming for the purpose of argument in this case that there is some form of true "deception" when people receive the forms in the mail from their creditors, it is Respondent's contention that the Federal Trade Commission has no jurisdiction to prevent such use of the forms.

The statute upon which jurisdiction is based by the Federal Trade Commission in this case states that, "... deceptive acts or practices in commerce, are declared unlawful." 15 USCA 45 (a) (1). Respondent concedes, of course, that the sale of his forms to his purchasers is "in commerce" as that term is used to designated interstate commerce. However, simply because the forms were sold in interstate commerce does not mean that there is "deception" in interstate commerce. Respondent has never deceived any of his purchasers as to his forms. In fact, there has never been any complaint to Respondent's knowledge by either a purchaser or the Federal Trade Commission that Respondent was deceiving any purchaser. The only claimed deceit is in the use of the forms and materials. The forms and materials are "used" only after they have been sold in interstate commerce. The "use", therefore, is not in interstate commerce and consequently there can be no "deceptive

acts or practices in commerce."

The Federal Trade Commission is an administrative agency and it has no powers except those granted to it by Congress. FEDERAL TRADE COMMISSION v. MENZIES, 145 F. Supp. 164, D.C. N.Y. 1956, affirmed 242 Fed.2d 81. Congress has given the Commission, through 15 USCA 41 and 45, the power to control "deceptive acts or practices in commerce." Thus, the only practices with which the Commission may concern itself are transactions in interstate commerce. BUNTE BROS. v. FEDERAL TRADE COMMISSION, 110 Fed.2d 412 (1940), affirmed 312 U.S. 349. Since all of the complained of acts or practices in this case occur well after the interstate commerce transaction, the Federal Trade Commission has no jurisdiction to control alleged deception occasioned by the use of the forms produced by Respondent.

II

THE ORDER ISSUED BY THE FEDERAL TRADE COMMISSION IN THIS CASE IS UNREASONABLE, ARBITRARY AND CAPRICIOUS AND IS THUS A DENIAL OF THE DUE PROCESS GUARANTEED RESPON- DENT BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Supreme Court of the United States has long held that legislation by either state or federal legislators

must not be arbitrary or capricious -- it must be based on some rational basis. See UNITED STATES v. CAROLINE PRODUCTS CO., 304 U.S. 144 (1938). It cannot be that an administrative body such as the Federal Trade Commission is subject to any less of a standard when it exercises its powers of executive legislation.

The order issued by the Commission does not merely state that Respondent is to cease only those acts or practices which cause the so-called "deception." It goes much further and prevents Respondent from engaging in the business of helping to obtain information concerning delinquent debtors and assisting in the collection of delinquent accounts. The order prevents Respondent from using such simple, and as the Hearing Examiner found, functional, designations as "Claimant's Information Questionnaire," "Current Employment Records," "Change of Address," and "Questionnaire".. (See Hearing Examiner's finding at C.T. 96.)

The order also requires that Respondent include on any form he produces a statement "in a prominent place, in clear language and in type at least as large as the largest type, exclusive of captions, used on said form...." This order is made without any qualification as to the use of such a statement only on the forms in question, but the order states that such a statement must be included on any forms produced by Respondent in the business of "obtaining information concerning delinquent debtors or assisting in

the collection of delinquent accounts...." (C.T. 235)

In addition, the order prohibits the use of Respondent's Washington, D.C. return address on any envelope without also including on the envelope - "in a prominent place, in clear language, and in type at least as large as the largest type used on said envelope the identity of the creditor and the fact that the enclosed forms do not come from the United States Government...." (C.T. 236) Under such an order, Respondent cannot even use one of the names of any of his companies such as National Research Company or Payment Demand, Inc., without also including the name of the creditor. There is no basis for such an order.

This Court's language in the prior contempt proceeding becomes relevant at this point: "We cannot forbid an otherwise legitimate business from mailing its letters from the Country's Capital, whether the sender lives or has his business there, or elsewhere." 315 Fed.2d 423, 425. If this Court cannot so forbid, neither can the Federal Trade Commission.

The Hearing Examiner at least attempted to make an order which was based on some rational attempt to prevent what he thought were deceptive acts or practices. He made an attempt to "tailor" an order so as to allow Respondent to continue in his business and yet prevent those acts or practices which he thought to be "deceptive".

"So far as concerns the envelopes and forms

it is obvious from the Findings of Fact and the Conclusions of Law herein, and it is merely a restatement, that, assuming their correctness, respondent has engaged in unfair trade practices by simulating governmental or official documents, and authority, and that he has done so primarily by and through the distribution and use of the brown window envelopes in which the forms are mailed to debtors and others. Accordingly, it would seem that the order should certainly prohibit the use of these envelopes as distributed and used in the past.

"It also follows from the Findings and the Conclusions that respondent has, although perhaps in a somewhat lesser degree, simulated governmental and official documents, and authority, by the skip-tracer forms, principally by not making the present disclaimer thereon sufficiently large and prominent. Inasmuch as the examiner holds that a disclaimer is still necessary, the defect cannot be corrected simply by eliminating the envelopes as used in the past which would cure the simulation caused by the envelopes.

"Under the said Findings and Conclusions, however, respondent does not create unlawful simulation of governmental documents or authority

through his collection forms ('Payment Demand') as such. This is because they plainly reveal a private indebtedness and a simple demand for payment. Thus, the order to be issued need not proscribe the use of the collection forms. They may still be used by respondent if the unlawful simulation caused by the brown window envelopes is removed.

"Moreover, under the Findings and the Conclusions, the respondent does not create the unlawful simulation of governmental documents or authority by the distribution and use of the return envelopes themselves, as used with the skip-tracer forms. The simulation is not produced apart from the brown window envelopes in which the return envelopes are mailed with the skip-tracer forms. Accordingly, the order herein need not prohibit the distribution and use of the return envelopes if there is a sufficient prohibition of the brown window envelopes as used in the past.

"Nor, in the examiner's opinion, as will be discussed below, should the order herein attempt to prohibit the use of third party authority or of the address of a third party, or mailing the forms from Washington, D.C.

"To the examiner the foregoing makes it

absolutely appropriate that any order herein which it is tailored*/ to the lawfulness as actually found, must and should expressly prohibit (1) the use of these brown window envelopes and more specifically, the use of the color brown for these envelopes, (2) the use of the skip-tracer forms unless the disclaimer statement is made more adequate, and (3) nothing else in regard to forms and envelopes except by way of a general prohibition against simulating governmental or official documents, and authority.

"This would prohibit less in respect to the forms themselves than the prohibitions in the complaint counsel's proposed order. What this does contemplate is forbidding the respondent to continue to use brown window envelopes -- except, it may be added, by written authorization of the Commission as part of compliance procedure." (C.T. 123-124)

"*/ FEDERAL TRADE COMMISSION v. BROCH AND CO., 368 U.S. 360, 367, 368 (1962) - SWANEE PAPER CORP. v. FEDERAL TRADE COMMISSION, 291 F.2d 833, 838 (2d Cir. 1961) - MATTER OF TRANSGRAM CO., INC., F.T.C. Docket No. 7978 (9/19/62); 61 F.T.C. 629, 700-702."

It is Respondent's belief that he was not accorded a

fair and unprejudiced hearing on this matter before the Federal Trade Commission itself, and that this is the reason for the vast difference in the order issued by the Hearing Examiner and that which was ultimately issued by the Commission. The attitude of the Hearing Examiner in his written opinion and that of the Commission in its written opinion validates such a belief:

Hearing Examiner's Opinion:

(1) "Respondent here has, to be sure, violated public policy and substantive law as to a very serious offense, the simulation of governmental or official documents, and authority. However, actually there are some extenuating circumstances in connection with this violation. In the examiner's opinion these circumstances are at least sufficiently extenuating so as, by themselves, to exonerate respondent from a cease and desist order as here proposed by complaint counsel, which would virtually put him out of business." (C.T. 130)

(2) "The examiner believes that respondent testified truthfully about this. Moreover, his testimony narrated a number of details inherently tending to demonstrate its reliability as to the salient fact testified to." (C.T. 130)

(3) "The examiner equally believes that respondent will conform to the law if the mandates are made

clear to him, as they are in the order below.

As a witness, the respondent impressed the examiner both by his testimony and demeanor as being an honorable and dependable person who was merely fighting for what he thought was right as a businessman." (C.T. 133)

The attitude of the Commission on the other hand is displayed in the first sentence of their opinion: "This appeal is the latest round in what has become a Brobdingnagian battle between the Commission and this Respondent."

The Commission made an unreasonable, arbitrary and capricious order against Respondent without any rational basis for such a wide sweeping and devastating blow to Respondent's business -- except perhaps its own prejudices against Respondent. Such an order should be reversed by this Court.

III

THE FEDERAL TRADE COMMISSION EXCEEDED ITS JURISDICTION IN MAKING AN ORDER IN THIS CASE WHICH GOES FAR BEYOND THAT WHICH IS NECESSARY TO PREVENT "DECEPTION IN COMMERCE".

As was pointed out above, the Federal Trade Commission is given the power in the Federal Trade Commission Act to prevent "deceptive acts or practices in commerce." 15 USCA 41 and 45. However, the Act does not give the

Commission power to issue orders which go far beyond that which is necessary in order to prevent the claimed "deception". As also noted previously, the Hearing Examiner found that as to the "Skip-Tracer" forms, the only deception was caused by the brown window envelopes and that the disclaimer on the "Skip-Tracer" forms was too small to prevent the deception, (C.T. 123) and as to the "Payment Demand" forms the only deception was caused by the use of brown window envelopes: " -- However, these collection forms definitely do not produce the simulation in question by themselves, i.e., apart from their being used together with the brown window envelopes in which they are mailed." (C.T. 121)

The Commission's Order goes far beyond preventing such deception. The effect of the Commission's Order is to order Respondent out of business. The Hearing Examiner recognized this result in his opinion:

"The question of scope of order is inextricably intertwined with questions of public policy. Although complaint counsel's proposed order herein, designed to curb respondent's unlawful conduct, would tear asunder a specialized business technique, if not the business itself, and virtually destroy a rather ingenious system of forms designed to assist in the collection of debts, it is doubtful that public policy or

public interest requires such a drastic result. To bring about such a result by the order, instead of concentrating the prohibition of the order on the simulation, largely by the envelopes, of governmental or official authority, is, in the examiner's opinion, quite analogous to taking away an established trade name containing an element of simulation, instead of permitting the trade name to be used in some qualified or limited way which removes the simulation.*/

"To begin with, there is, of course, nothing inherently wrong about the collection business, or about the skip-tracer and collection form business. So long as we continue to have in this country a competitive free enterprise system such as we now have, there will have to be legal means to compel or attempt to induce debtors to pay their debts. Moreover, it is obvious under our system that if debtors do not pay their debts the loss to creditors is shifted to other consumers or purchasers; or if the loss becomes so large

"*/ See: FEDERAL TRADE COMMISSION v. ROYAL MILLING CO., 288 U.S. 212, 217 (1933) - JACOB SIEGAL CO. v. FEDERAL TRADE COMMISSION, 327 U.S. 608, 612, 613 (1946).

as to be insurmountable, the result is bankruptcy for the creditors or at least going out of business. The respondent, citing respectable credentials for himself as to expertise, has testified to this, if actual testimony is necessary to prove the point. Our society is not as yet so permissive that people are not supposed to pay their debts or submit to reasonable efforts to collect the debts.

"Skip-tracer and collection forms are necessary, it seems to the examiner, because of the small dollar amount of each indebtedness in many lines of trade, particularly as brought about by mass selling, which is so characteristic of our present free enterprise system. Obviously, lawyers cannot afford to take on accounts of this nature, or, if they do -- often as auxiliaries to collection agencies -- the amount of their fees and court costs tend to discourage further retention of the attorneys or of the collection agencies which may have retained them. Moreover, the fees of collection agencies even without forwarding to attorneys are not unsubstantial. Small businesses, which many people regard as of particular concern to the Commission, as well as middle-sized businesses,

thus very often have to depend on collection efforts through collection forms, rather than utilizing collection agencies, with or without attorneys, or utilizing attorneys directly.

* * *

"It is true that sometimes alleged debtors may not be actual debtors. But as against this there are the 'deadbeats', comprising large numbers of people who do not even wish to pay their debts, who may purchase and deliberately change addresses over night, and who may thus merely load their indebtedness on other purchasers or bankrupt the sellers, much as respondent herein testified." (C.T. 127-129)

Respondent's valid business enterprise should not be completely destroyed by an order of the Commission which is so encompassing and over-broad that it constitutes an exercise of jurisdiction which the Commission has not been given. That part of the Order which goes beyond what is required to prevent "deception" is void and this Court should reverse the ruling by the Commission.

IV

THE ISSUE OF THIRD PARTY AUTHORITY WAS NOT RAISED BY THE COMPLAINT IN THAT THERE WAS NO MENTION THAT RESPONDENT HAD COMMIT-

TED ANY ACTS FROM WHICH AN INFERENCE COULD
BE DRAWN THAT DEBTS HAD BEEN REFERRED TO
ANYONE FOR COLLECTION.

The Hearing Examiner at the pre-hearing conference in Washington, D.C., granted permission to counsel supporting the complaint to move to amend the complaint to plead the "third party mailing issue" as part of the conclusory portion of paragraph 10. (R.T. 35, 4-16) Counsel supporting the complaint did not move to amend the complaint.

According to the brief below of counsel supporting the complaint, "By a third party referral is meant conveying the inference by the creditor that a debt has been referred to someone for collection when that is not true." (C.T. 220) However, the complaint did not allege that any such actions had been committed by Respondent. Paragraph 10 of the complaint merely states that the forms and other material has had and now has the tendency and capacity to mislead and deceive persons to whom said forms are sent. There is no pleading to indicate that any alleged deception occurs merely because the notice comes from "Payment Demand" in Washington, D.C. (C.T. 6)

The Hearing Examiner ruled that such a third party authority issue had not been sufficiently raised by the complaint, but the Commission reversed on the grounds that the complaint "comprehends a charge that respondent's

forms represent that a third party, unrelated to the creditor, has an interest in the debt or in seeing that the debt is collected." However, the purpose of a complaint is not that it "comprehend" an issue or a charge but that it give notice to the defendant or respondent of the charges being made or the issues being raised. The respondent should not be made to guess which issues or charges are being made or are being pressed.

The ruling of the Commission as to the third party authority issue is erroneous and this Court should reverse the Commission and adopt the ruling of the Hearing Examiner:

"As to the existence in the complaint of any charge of misrepresentation as to third party authority or use of a third party address, complaint counsel stated at the prehearing conference that he relied on the facts as alleged in FOUR and FIVE of the complaint, and the general allegation of deception in TEN, as referred to above. However, he finally stated at the conference that he would move to amend the complaint to include such a charge (TR 35, 1. 1-3). The examiner stated that he would give him leave to make such a motion (TR 35, 1. 4), intending to certify the motion to the Commission as being within its sole prerogative under its Rules and

the STANDARD CAMERA case.* The examiner also stated: 'If you don't make such a motion, I think I can rule now -- and I will rule -- the issue is not in the case' (TR 36, 1. 12)

"It so happens, however, that complaint counsel, for reasons not known to the examiner, ultimately elected not to make the motion, and has never made it. Under these circumstances the examiner now concludes, after much deliberation, that he cannot hold that a charge of misrepresentation as to third party authority or the use of a third party address is alleged in the complaint. A contrary holding would, at the very least, be unfair to respondent, who has been lulled into a sense of security and deprived of possible proof, expert or otherwise, in his behalf. Even if the complaint could possibly be construed to allege such a charge, complaint counsel should be estopped from so contending." (C.T. 86-87)

V

THE COMMISSION IS BOUND BY ITS OWN RULES
OF PRACTICE AND THOSE RULES REQUIRE THAT
THE COMMISSION REOPEN PROCEEDINGS TO

QUESTION CONDUCT WHICH WAS THE SUBJECT OF
THOSE PRIOR PROCEEDINGS.

As has been previously noted, the complaint first issued against Respondent by the Commission in 1954 covered the same "acts of deception" covered by the complaint issued in this case with the exception of the "Payment Demand" forms.

It is clear that respondent filed compliance reports under the previous order on June 27, 1960, and August 28, 1963 (Exhibits 1A-L; 3A-QQ). Those reports were accepted by the Federal Trade Commission on June 30, 1960, and December 20, 1963 (Exhibits 2; 4). It is also clear that no action has been taken to either revoke the prior approval or to reopen the previous proceedings.

Section 3.26(c) of Rules of Practice for Adjudicated Proceedings of the Federal Trade Commission provides that:

"The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission."

Section 3.28(b) of the same rules provides that:

"Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review ... the Commission will serve upon each person subject to such decision and order an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary."

The statute upon which these rules are based is 15 USCA 45(b) wherein it is stated:

"After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or law have so changed as to require such action or if the public interest shall so require ..."

The Commission did not follow its own Rules of Practice in any respect. A completely new complaint was

issued instead by the Commission.

In its Order, the Commission in discussing this very point cites the case of ELMO DIVISION OF DRIVE-X CO. v. DIXON, 348 Fed.2d 342 (D.C. Cir. 1965). The Commission maintains that that case is "clearly distinguishable" from the present one because of its unique set of facts. However, the Commission fails to note some important language of that decision which does not depend on the fact that the particular Rule of Practice there involved was incorporated in the consent agreement. Footnote "4" of that opinion reads as follows:

"The Commission argues that since the statute says the Commission 'may' reopen, no such mandatory language appears as supported District Court jurisdiction in KYNE. While not reaching the question of the sufficiency of the statutory language alone to support jurisdiction, we note in passing that the Commission's argument is not weighty. A provision that the Commission 'shall' reopen would make no sense at all: Reopening is meant to be discretionary with the Commission, and reopenings the exception rather than the rule. We think it more likely that the language means the Commission may reopen any order if it chooses, and if it does so, it shall proceed

in the manner detailed in the statute."

(Emphasis in original) at p. 344

The statute the court was there discussing is the same statute here involved: 15 USCA 45(b).

Thus, the Commission has not followed its own Rules of Practice in this case and should be estopped from proceeding in the matter under the new complaint.

CONCLUSION

It is respectfully submitted that irrespective of any other decisions of the Federal Trade Commission, this case must stand on the facts involved herein. Previous orders of the Commission resulting in cease and desist orders were based on facts which are distinctive from the instant case.

The Order of the Federal Trade Commission is erroneous as well as void. This Court should vacate that Order and dismiss the complaint.

Respectfully submitted,

MURRAY M. CHOTINER

Attorney for Petitioner

No. 22,733

**In the United States Court of Appeals
for the Ninth Circuit**

**SYDNEY N. FLOERSHEIM, AN INDIVIDUAL TRADING AND
DOING BUSINESS AS FLOERSHEIM SALES COMPANY
AND NATIONAL RESEARCH COMPANY, *Petitioner,***

FEDERAL TRADE COMMISSION, *Respondent.*

***On Petition to Review an Order of the Federal Trade
Commission***

BRIEF FOR RESPONDENT

FILED

FEB 3 1959

JAMES McI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

ALVIN L. BERMAN,
Attorney,

M. B. LUCK, CLERK *Attorneys for the Federal Trade Commission,*



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ISSUES PRESENTED FOR REVIEW

1. Whether there is substantial evidence to support the Commission's findings that petitioner's forms, demanding the payment of debts and seeking information concerning delinquent debtors, are misleading or have the tendency and capacity to deceive.

2. Whether petitioner received adequate notice that he was being charged with misrepresenting that a third party, unrelated to the creditor, was interested in a debt or in seeing that it was collected.

3. Whether the Commission was estopped from issuing a new complaint with regard to petitioner's unfair and deceptive acts and practices engaged in subsequent to the issuance of an outstanding order to cease and desist and relating primarily to acts and practices not covered by that prior order.

4. Whether the Commission has abused its discretion in its formulation of an order to cease and desist.

STATEMENT OF THE CASE

This case arises upon a petition to review an order to cease and desist issued by the Federal Trade Commission at the conclusion of a proceeding upon a complaint which charged petitioner with engaging in unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.¹

History prior to present proceedings

On June 1, 1956, the Commission ordered petitioner Sydney N. Floersheim, then trading as S. Floersheim Sales Company, and one Mitchell S. Mohr, then trading as National Research Company, in connection with the business of obtaining information concerning delinquent debtors or selling forms for use in obtaining such information (skip tracer forms), to cease and desist from using or furnishing forms which make certain deceptive representations. *Mitchell S. Mohr*, Docket 6236, 52 F.T.C. 1466 (1956).

¹ The pertinent provisions of the Act are as follows:

Sec. 5(a)(1). “* * * [U]nfair or deceptive acts or practices in commerce, are hereby declared unlawful.” 66 Stat. 632, 15 U.S.C. 45(a)(1).

Sec. 5(a)(6). “The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using * * * unfair or deceptive acts or practices in commerce.” 66 Stat. 632, 15 U.S.C. 45(a)(6).

Sec. 5(b). “Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any * * * unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it * * * would be to the interest of the public, it shall issue * * * a complaint stating its charges * * * and containing a notice of a hearing * * *. If upon such hearing the Commission shall be of the opinion that * * * the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue * * * an order requiring such person, partnership, or corporation to cease and desist from using * * * such act or practice * * *.” 52 Stat. 112, 15 U.S.C. 45(b).

Subsequently, disagreement arose between Floersheim and Mohr and the Commission as to the meaning and scope of the order. The Commission believed that the skip tracer cards used by Floersheim and Mohr continued to have the tendency and capacity to mislead and deceive. The Commission, therefore, in November 1958, deeming that the public interest so required, reopened the proceeding and modified the order. 55 F.T.C. 720 (1958). On petition to review filed by Floersheim and Mohr, this Court sustained the Commission's action and affirmed and enforced its modified order to cease and desist. *Mohr v. Federal Trade Commission*, 272 F.2d 401 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960).

Floersheim purchased Mohr's interest in National Research Company in 1961 and became the sole proprietor of the enterprise (I 239; I-B 290-91, 418).² In November 1962, the Commission petitioned this Court to adjudge Floersheim in criminal contempt for alleged violations of the Court's order of affirmance and enforcement. This Court held that the Commission's order did not forbid certain of the practices complained of. As to others, it held that Floersheim had violated the order but that he was not guilty of criminal contempt as the Court could not find that the violations were flagrant, deliberate and reckless. At the same time, the Court expressed hope that Floersheim would voluntarily comply with the language and spirit of the order so the matter finally might be terminated and not be before the Court again. *In re Floersheim*, 316 F.2d 423 (9th Cir. 1963).

Both the Commission's original order to cease and desist and its modified order as affirmed and enforced by this

² The Transcript of the Record prepared pursuant to this Court's Rule 4 is in three volumes designated "Vol. I," "Vol. I-A" and "Vol. I-B." References to materials in the Transcript are made by citing the volume followed by the page number in that volume. The cited pagination in Vol. I appears at either the lower left-hand or lower right-hand corner of each page. The cited pagination in Vols. I-A and I-B appears at the upper right-hand corner of each page.

Other abbreviations used include: CX—Commission Exhibit; Pet. Br.—petitioner's brief to this Court.

Court, as well as the matters brought to this Court's attention in the contempt proceeding, were limited to the use, sale and distribution of skip tracer forms. *Forms for use in collecting delinquent accounts were not involved.*

Proceedings before the Commission

A. Pleadings

The Commission's complaint in the instant case was issued on November 7, 1966. It charged that Floersheim, operating as Floersheim Sales Company in Los Angeles and as National Research Company at 748 Washington Building, Washington, D.C., was in the business of preparing and selling in commerce printed forms and other materials designed and intended for use, *with Floersheim's assistance*, in collecting delinquent debts and in securing information concerning delinquent debtors; that these forms and materials contained various false, misleading and deceptive representations; and that by placing them in the hands of others petitioner provided them with false, misleading and deceptive means whereby they may secure payment of delinquent accounts or obtain information about delinquent debtors (I 2-5).

More specifically, it was alleged that the skip tracer forms simulated official and governmental documents including the utilization of fictitious and official sounding names such as "Claimants Information Questionnaire," "Current Employment Records," "Change of Address" and "Questionnaire," and the address "748 Washington Building, Washington, D.C."; "that while these forms contained a statement disclosing their purpose and that they were not connected with the United States Government, the statement was in such small type and was so inconspicuous that recipients would be unlikely to notice it (I 3-4).

It was further alleged that purchasers of the skip tracer forms would fill in each form with the name and address of the debtor, or other person from whom information concerning the debtor was to be requested, and would insert the form and a return envelope in a brown window envelope

similar to those used by the United States Government. The return address on the brown window envelope was "748 Washington Building, Washington, D.C." Also printed on the front was "The Form Enclosed is Confidential. No One Else May Open." The return envelope was addressed to one of the fictitious names, previously listed, at 748 Washington Building, Washington, D.C. Purchasers would send the forms so prepared for mailing to Floersheim in Washington, D.C. Petitioner would stamp them with a postage machine bearing a Washington, D.C., postmark and mail them from Washington. Responses made to the Washington, D.C., address would be sent to the purchasers of the forms (I 4).

The forms and material sold for the purpose of collecting delinquent accounts were also alleged to simulate official or government documents. The name "Payment Demand" and the address "748 Washington Building, Washington 5, D.C." were used as well as the statement "Notice mailed from Washington, D.C. by Payment Demand." The forms also were alleged to contain a statement as to a creditor's rights to collect judgment from the debtor in the pertinent state, the statement sometimes being incorrect. These forms were also prepared by creditors for mailing by Floersheim from Washington, D.C. (I 4).

It was also charged that Floersheim's sales literature falsely represented that his forms used in collecting delinquent debts had been determined by the Federal Trade Commission to be in compliance with its order to cease and desist issued in *Mitchell S. Mohr*, Docket No. 6236, and that the forms had been approved by the Commission (I 4-5).

Floersheim generally admitted the manner in which he conducted his business as well as the description of his forms and other materials, as set forth in the complaint, but denied that the forms or their use were false, misleading or deceptive. He also admitted representing that his forms used in collecting delinquent debts had been determined by the Commission to be in compliance with its order to cease and desist issued in Docket No. 6236 and that

the forms had been approved by the Commission, but asserted that these representations were true (I 17-20).

B. The examiner's initial decision

The examiner, after hearings, held that Floersheim had misrepresented, and placed in the hands of purchasers of his forms the means and instrumentalities of misrepresenting, that the requests for information in the skip tracer forms and the demands for payment in the Payment Demand forms were from a governmental agency or were to be used for official purposes; and that this tended to induce recipients of the forms to supply information or to do acts which they otherwise might not have done (I 93, 102, 104-8, 120-22).

The brown window envelopes in which the forms were mailed were deemed particularly deceptive as simulating government or official origin (I 93-5, 99-100, 104, 106). The skip tracer forms were held similarly deceptive and to reinforce the misrepresentation created by the brown window envelopes (I 93, 99, 106, 120).³ The examiner found that the statement on the forms to the effect that their purpose is to secure information concerning a delinquent debtor and that there is no governmental connection is in such small type and is so inconspicuous that it is unlikely to be noticed by recipients (I 98, 106, 120).

Reply envelopes sent with the skip tracer forms, while not deemed deceptive in themselves, were held to contribute to the deception caused by the outside envelopes and the forms (I 101, 120-21). The Payment Demand forms also were held to contribute to and perpetuate the deception created by the brown window envelopes, but were held not to be misleading in themselves (I 102, 107, 112, 121).

The examiner found false, misleading and deceptive Floersheim's representations that his Payment Demand forms had been determined by the Commission to be in

³ Floersheim is in error in stating (Pet. Br. 9) that the examiner held that the skip tracer forms were not deceptive.

compliance with the requirements of the Commission's order to cease and desist in *Mitchell S. Mohr*, Docket No. 6236, and that the Commission had approved these forms (I 108, 121).

While recognizing that the facts proved might justify holding that Floersheim had misrepresented that a third party, unrelated to the creditor, had an interest in the debt or in its collection, the examiner held that the complaint did not encompass such a charge (I 85-7, 115, 121). He also dismissed the charge that Floersheim had misrepresented the rights of creditors to collect judgments against debtors, holding that the matter was not too important and that the statement had not been proved to be substantially deceptive (I 102-03, 122).

The examiner, therefore, issued an order to cease and desist which was narrowly drawn, reflecting his limited findings of violation (I 136-40).

C. *The Commission's opinion*

On cross-appeals, the Commission denied Floersheim's appeal and granted that of complaint counsel. It issued an opinion which included findings of fact and conclusions of law, and adopted the examiner's findings to the extent not inconsistent with its own opinion. It also modified the examiner's order to conform to the views of the Commission (I 234-37, 242).

The Commission rejected Floersheim's contentions that it could not proceed without first rescinding approvals of reports filed by him as to compliance with the prior order in Docket No. 6236. In addition to the absence of any rule or reason requiring such revocation, the Commission pointed out that one of the letters relied upon by Floersheim was from the Commission's Assistant General Counsel for Compliance, did not purport to speak for the Commission, and merely stated that, in his opinion, *collection forms* submitted by Floersheim did not violate the Commission's order (which was limited to *forms seeking information* concerning delinquent debtors) "*inasmuch as they do not request any information concerning delinquent debtors*"

(emphasis supplied). It was also explained that a subsequent letter from the Commission largely conformed to this Court's holding in the contempt action that certain of Floersheim's practices were not included within the order to cease and desist. Revocation of the approval given to the compliance report, therefore, was not deemed a prerequisite to further action looking toward prohibition of practices not encompassed by that order (I 245-47).

Petitioner's additional contention that the Commission could not issue a new complaint, but could only reopen the old proceeding, was also rejected. The Commission held that it could proceed relative to practices not covered by the prior order, in its discretion, either by reopening that order or by issuing a new complaint; that Floersheim not only had no "vested right" in the reopening procedure but that the Commission's choice was a matter of indifference to him since no substantial rights could be impaired by the choice. Under either procedure, Floersheim would be entitled to a full evidentiary hearing, to a decision based on the record and to a review by a court of appeals (I 247-50).

While not obliged to do so, the Commission explained why it had decided to issue a new complaint rather than to proceed for modification of the existing order. This was because the challenged practices were different in many respects from those involved in the prior proceeding⁴ and, in a new proceeding, the Commission could focus on the issues raised by Floersheim's current business practices rather than on irrelevant side issues relating to practices that gave rise to the prior order or to details of Floersheim's compliance with that order (I 249).

The Commission also reversed the examiner's holding that the complaint had failed to plead the "third party mailing" issue, *i.e.*, whether Floersheim's forms represent

⁴ The bulk of Floersheim's business in 1966 consisted of the sale of "Payment Demand" forms, a type of form not involved in the prior proceeding or order. Thus, of some 2,900,000 forms sold, over 2,000,000 were "Payment Demand." Only 766,000 were skip tracer forms, the subject of the prior order to cease and desist (I-B 417-18).

that a third party, unrelated to the creditor, has an interest in the debt or in its collection. The Commission held that the complaint not only comprehended such a charge, but that Floersheim was aware of complaint counsel's position that the charge was adequately pleaded and, recognizing that complaint counsel's position ultimately might be sustained, Floersheim had introduced evidence as a defense to the charge; that, under these circumstances, Floersheim could not possibly be prejudiced by the Commission's holding that the third party issue was included. The Commission held further that since the undisputed evidence, clearly admissible under the specific allegations of the complaint, established that Floersheim's forms created the "third party" deception, and he was apprised of this theory of the case and had ample opportunity to meet this charge, the Commission could proscribe this deceptive practice even if it might be encompassed only by implication in the complaint (I 258-61).

In passing upon the tendency and capacity of Floersheim's forms to mislead or deceive, the Commission explicitly stated that its determination did not turn upon the credibility or demeanor of witnesses, or the examiner's analysis, but upon its own independent first-hand examination of the forms (I 251).

From its examination of the envelopes and forms, the Commission found that they clearly were deceptive and misleading, "creating the impression that they came from the government or some other official source or third party, rather than from the creditor" (I 251). More specifically, the envelopes, in appearance and format, were found to simulate those used by the United States Government for official purposes (I 251). The skip tracer forms themselves were found to be deceptive, *inter alia*, because of their general appearance and similarity to government checks, the use of fictitious names, such as "Claimant's Information Questionnaire," the prominent use of the address, "748 Washington Building, Washington, D.C." (on the return envelopes as well as on the forms), the peremptory nature of the requests for information and the directive on "Claimant's Information Questionnaire" to

“Fill in this form for identification to aid collection in full for claimant.” These factors were all deemed to conceal the true nature of the request for information (I 251-52).

The effects of the subterfuge were held not to be dispelled by the disclaimer in small print which was deemed inconspicuous and unintelligible to recipients, who are often persons of low income with minimal formal education (I 252-53).

Petitioner’s collection or “Payment Demand” forms sent in the same brown envelopes, frequently to uneducated or illiterate debtors, were similarly held to have the capacity and tendency to deceive. This evaluation of the forms was held substantiated by the testimony of debtors and persons familiar with legal problems of the poor, including testimony to the effect that low income debtors believe that any notice from Washington, D.C., must be from the government. This assumption was held exploited by mailing the forms from Washington, D.C., by prominently using the Washington, D.C., address on the envelopes and the forms, by the statement “NOTICE MAILED FROM WASHINGTON, D.C., BY PAYMENT DEMAND,” and the prominent use of elaborate style type on various forms to simulate legal documents. These were all held to imply that the government or some other third party was interested in seeing that the debt was collected (I 253-56).

Reversing the examiner, the Commission also found deceptive the statement on the Payment Demand forms which purported to state a creditor’s rights under state law to attach his debtor’s property. The statement failed to take into account numerous variations in state law, *e.g.*, exemptions for particular kinds of property, limitations on wage or salary attachments, and even the right of an alleged debtor to appear and defend himself in court before a judgment might be secured and executed against him. The Commission found that the purpose of this statement was to intimidate and deceive the debtor by presenting a creditor’s rights in overly broad and threatening terms (I 256-57).⁵

⁵ Floersheim’s brief to this Court does not direct itself to this finding of deceptive practice nor to that portion of the order to cease

The Commission did adopt the examiner's findings to the effect that Floersheim's promotional literature misrepresented that his forms had been approved by the Commission and had been deemed to be in compliance with the Commission's prior order (I 256).⁶

The Commission, therefore, modified the examiner's proposed order to proscribe the unlawful practices it had found and, as modified, issued it as its final order to cease and desist (I 234-37).

The facts

There is no substantial dispute as to the facts. Floersheim admittedly sells and distributes in commerce the forms that are in evidence and conducts his business in the manner found by the Commission. His objections go primarily to the representations attributed by the Commission to his forms and to the inferences and conclusions drawn by the Commission. In making the following summary of the Commission's findings as to the facts, much of the detailed description of the forms has been deferred to the argument portion of this brief.

Petitioner Sydney N. Floersheim resides in California and sells skip tracer and Payment Demand forms and related materials from Los Angeles, California, under the Floersheim Sales Company trade name. Sales are made to business concerns throughout the country with delivery either from California or the District of Columbia so that Floersheim maintains a substantial course of trade in commerce. Skip tracer forms are sold to creditors who are seeking to locate or secure information concerning debtors. Payment Demand forms are sold to creditors to aid in collecting delinquent accounts. The forms are designed and intended by Floersheim to be used by Floersheim's customers for these purposes. While sales are made from California, an office is maintained in the Washington Building, Washington and desist which proscribes such a practice (I 236). Floersheim, therefore, may be deemed to have waived any objection thereto (see *infra*, p. 28).

⁶ Similarly, Floersheim's brief to this Court is silent as to this finding of deceptive practice and to that portion of the order to cease and desist which covers such a practice (I 237).

ton, D.C., where the forms are published by Floersheim while trading as National Research Company. He does not operate as a collection agency (I 84, 91-2, 242, 260).

The forms, together with the brown window envelopes in which they are to be mailed, are sent to the purchasing creditor. The creditor inserts the name and address of the person to whom the form is to be sent (*i.e.*, the debtor or other person from whom information is sought) and other pertinent data, according to the type of form used, and places the form in the brown window envelope so the name and address shows.

The forms are now ready to be mailed to the addressees, but they are not. Instead, the creditor sends them to Floersheim in Washington, D.C., who affixes a blue metered stamp to each envelope depicting a spread eagle and mails them from Washington, whereby a Washington, D.C., postmark is affixed (see, *e.g.*, CX 23A, 48B, 55B). The brown window envelope is similar in color, size and format to those used by the United States Government. On the upper left-hand corner is the return address, 748 Washington Bldg., Washington 5, D.C. Also prominently printed on the envelope is "The Form Enclosed is Confidential. No One Else May Open" (I 93, 99-101, 242-43, 251).

The skip tracer forms are on check-size IBM cards, and some of them are the green shade of a United States Government check. Many prominently use the word "Questionnaire," one being entitled "Claimant's Information Questionnaire."⁷ They all demand various information in an authoritative and peremptory way (*e.g.*, "FILL OUT REVERSE SIDE OF THIS FORM AND RETURN WITHIN 5 DAYS;" or "YOU HAVE CHANGED EMPLOYERS. COMPLETE QUESTIONNAIRE AND RETURN TO 748 WASHINGTON BUILDING, WASHINGTON, D.C."), and emphasize the Washington Building, Washington, D.C., address. They are accompanied by brown business reply envelopes which, varying with the form to be returned, are addressed to:

⁷ This form (CX 36) also directs: "Fill In This Form For Identification To Aid Collection In Full For Claimant."

Claimant's Information Questionnaire [or]
 Current Employment Records [or]
 Change of Address [all at]
 748 Washington Building
 Washington 5, D.C. (I 95, 97, 99-101, 243, 251-52).

The forms do bear the statement: "The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government." This disclaimer, however, is inconspicuous and unclear (I 98-99, 243-44, 252-53).

The procedure in sending Payment Demand forms to debtors is similar to that for sending skip tracer forms. The forms are filled in by the purchasers, placed in the same type brown window envelopes used with skip tracer forms and sent to Floersheim in Washington, D.C., for stamping and mailing from that city. Unlike skip tracer forms, responses are to be made directly to the creditor rather than to petitioner. Payment Demand forms are on IBM cards the size of a government check, and some of them are the green shade of a United States Government check. All are headed substantially as follows:

Payment Demand
 748 Washington Building
 Washington 5, D.C.

On the reverse side is "NOTICE MAILED FROM WASHINGTON, D.C. BY PAYMENT DEMAND." Other Payment Demand forms read:

Payment Demand
 748 Washington Building
 Washington 5, D.C.

Requests your Appearance in
 the office of the creditor,
 at the time specified.

In addition, some forms use elaborate style print that simulates legal documents (I 102-5, 244-45, 254-55).

Many recipients of the forms are individuals with low income who have had a minimal formal education; some

are totally uneducated or illiterate. Many people, particularly those who are uneducated, believe that anything from Washington, D.C., is from the United States Government (I 252-54).

In addition to the facts establishing the tendency and capacity of the forms to deceive, the record demonstrates instances where recipients were in fact deceived into believing that Payment Demand forms were from the United States Government (I 253-54).

Payment Demand forms also contain a statement to the effect that, subject to the laws of the appropriate state, a creditor may request an attorney to attach after judgment (before judgment in certain states) the debtor's property, "such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary." While the forms are sent to debtors in every state, they do not reflect the numerous variations in state law that limit a creditor's right to attach property, *e.g.*, exemptions for particular kinds of property, or limitations on wage or salary attachments. Neither do the forms notify the debtor that a judgment will not be entered against him without an opportunity to appear and defend himself in court (I 256-57).⁸

In addition to the Payment Demand forms which creditors forward to Floersheim for mailing to debtors, Floersheim sells follow-up forms which creditors mail directly to those debtors who have responded to Payment Demand, in Washington, D.C. These forms continue the demand for payment in terms of reference to the debtor's "LETTER TO PAYMENT DEMAND, WASHINGTON, D.C., PROMISING PAYMENT" (I 245).

SUMMARY OF ARGUMENT

It is in the public interest to proscribe unfair or deceptive acts and practices in the collection of debts and in the securing of information concerning delinquent debtors. Floersheim's sale in commerce of forms which are subsequently

⁸ As noted *supra*, p. 9, n. 5, petitioner does not contest the Commission's finding as to the deceptive character of this representation.

used to deceive and mislead is itself an unfair and deceptive act or practice covered by the Federal Trade Commission Act. In addition, Floersheim plays an active role in commerce in deceiving debtors and others.

The Commission's findings that Floersheim's forms have the tendency and capacity to mislead and deceive are supported by substantial evidence and are, therefore, conclusive. The tendency and capacity to deceive is obvious from an examination of the forms themselves. While not required, there is also supporting testimony of persons who have been deceived. The "disclosure" in the skip tracer forms is in small print and is otherwise inconspicuous; it is insufficient to undo the overall deception of the forms, the envelopes in which they are sent and the return envelopes. The size and placement of affirmative disclosures are matters of judgment for the Commission.

Floersheim received adequate notice that he was being charged with misrepresenting that a third party, unrelated to the creditor, was interested in the debt or in its collection. The complaint encompassed the charge; complaint counsel consistently took the position that the "third party" charge was included; and the examiner felt that the facts which were alleged covered such a practice and warned petitioner that, in his opinion, the Commission probably would find this to be one of the issues. Further, Floersheim's counsel acknowledged and expressed his understanding of complaint counsel's position and recognized that this was an issue which might be held to be included. Not only did he state that he would not be taken by surprise if the charge were held to be included, but he announced his readiness to meet the charge and introduced evidence to meet it.

The Commission's rules do not require that it act with regard to Floersheim's unfair and deceptive acts and practices, engaged in subsequent to the issuance of a prior order to cease and desist, only by reopening the prior proceeding. The Commission's choice to issue a new complaint was a proper exercise of its judgment, particularly since the present case, in large part, deals with matters not covered by the prior order. Floersheim has no vested right in a re-

opening procedure, and he has not been prejudiced by the Commission's choice to issue a new complaint.

The Commission did not abuse its discretion in formulating the order to cease and desist. The remedy selected bears a reasonable relation to the unfair and deceptive acts and practices that were found to exist. The order does not require Floersheim to discontinue his business of selling forms or otherwise engaging in the business of securing information concerning delinquent debtors or assisting in the collection of delinquent accounts. Neither does it preclude Floersheim from mailing his forms from Washington, D.C. All it requires is that he conduct his business in a truthful and nondeceptive manner.

ARGUMENT

Preliminary statement

Floersheim asserts (Pet. Br. 18-19) that his forms and materials are not deceptive because deceit requires damage or injury to someone, and there is no damage or injury since his forms are sent to debtors or to someone else as a means of reaching one who is a debtor. However, as this Court stated in *Silverman v. Federal Trade Commission*, 145 F. 2d 751, 753 (9th Cir. 1944) :

Petitioner's scheme is a cheap swindle, and the argument that it is less so because it may in certain cases trap swindling debtors is not one pleasing to entertain.

Nor is there any support for petitioner's contention that it is not a matter for the Commission's concern because the swindled person suffers no pecuniary damage.

Floersheim's assertion is particularly surprising since he was a party to *Mohr v. Federal Trade Commission*, 272 F. 2d 401, 405 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960), where this Court held that it was in the public interest to prevent the use of forms that deceived debtors into taking action they otherwise would not have taken or which otherwise, by deception, resulted in bringing delinquent debtors to task.

In addition to *Silverman* and *Mohr*, it has been uniformly held that it is in the public interest for the Commission to proscribe the use of unfair or deceptive acts and practices in the collection of debts and in the securing of information concerning delinquent debtors.⁹ And this includes false representations that a third party has acquired an interest in the debt or in its collection. *Slough v. Federal Trade Commission*, 396 F. 2d 870, 872 (5th Cir. 1968), *cert. denied*, 37 U.S.L. Week 3208 (Dec. 10, 1968).¹⁰ In addition to numerous other orders to cease and desist from engaging in practices similar to those here involved, the Commission has issued Guides Against Debt Collection Deception which warn against such practices (16 CFR 237, revised 33 Fed. Reg. 5661 (1968)).

Floersheim's additional contention (Pet. Br. 19-20) that, while he sells the forms in question in commerce, the Commission lacks jurisdiction since the alleged deception is in the use of the forms and they are used after the interstate sale, is equally devoid of merit. In *James v. Federal Trade Commission*, 253 F. 2d 78, 80 (7th Cir. 1958), *cert. denied*, 358 U.S. 821 (1958), petitioners similarly claimed immunization from Section 5 for their sales in commerce of punchboards, since they did not themselves participate in the ultimate use of the boards to make sales by chance at the local level. The court rejected this position, stating simply, "To describe their position posits the refutation of it. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483 (1922)." ¹¹

⁹ See, e.g., *National Clearance Bureau v. Federal Trade Commission*, 255 F. 2d 102, 103 (3d Cir. 1958); *Dejay Stores, Inc. v. Federal Trade Commission*, 200 F. 2d 865, 867 (2d Cir. 1952); *Bennett v. Federal Trade Commission*, 200 F. 2d 362, 363 (D.C. Cir. 1952); *Rothschild v. Federal Trade Commission*, 200 F. 2d 39, 42-3 (7th Cir. 1952).

¹⁰ See also *William H. Wise Co. v. Federal Trade Commission*, 246 F. 2d 702 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 856 (1957).

¹¹ To the same effect, see *Peerless Products, Inc. v. Federal Trade Commission*, 284 F. 2d 825, 826 (7th Cir. 1960).

Federal Trade Commission v. Bunte Bros., Inc., 312 U.S. 349 (1941), upon which Floersheim relies (Pet. Br. 20), actually sup-

Winsted Hosiery, 258 U.S. at 494, is the leading case for the principle that one who places in the hands of another the means of consummating a fraud or an unfair practice is himself guilty of a violation of the Federal Trade Commission Act.¹² Here, Floersheim has engaged in substantial interstate business, placing in the hands of creditors materials designed and intended for the very use to which they were put. He has customers in every state of the Union, some 5,000 in all, of whom 1500 purchase almost 3,000,000 forms annually (I-A 16, 87; I-B 295-6).

It is clear, therefore, that Floersheim's acts and practices of selling and distributing in commerce his materials to creditors for their subsequent deceptive use constitute "unfair" and "deceptive acts and practices in commerce" covered by Section 5 of the Federal Trade Commission Act. Further, Floersheim's activities are not limited to these sales in commerce. To the contrary, he plays an active role in the use of the forms to deceive creditors and others. For, as part of the operating procedure, after the forms are completed by the creditors, they are sent to Floersheim in Washington, D.C., and he stamps the envelopes and mails them to the debtors and others from whom information is sought. Responses to skip tracer forms are received by Floersheim in Washington and disseminated by him to the appropriate creditors throughout the country. Sometimes responses to Payment Demand forms are made to Floersheim in Washington, D.C., and he forwards moneys received to the creditors (see *supra*, pp. 11-12, and I-A 80-82, 88-91; I-B 307-08, 386, 389, 393, 396-7, 420).

Under similar circumstances the court, in *National Clearance Bureau v. Federal Trade Commission*, 255 F.2d 102, 103 (3d Cir. 1958), held that a contention that the petitioner

ports the Commission's position. In *Bunte*, the Commission was held to lack jurisdiction because Bunte's sales of its "break and take" packages of candy were wholly within the estate of Illinois. Here, Floersheim's sales admittedly are in interstate commerce.

¹² *Accord*, *Goodman v. Federal Trade Commission*, 244 F.2d 584, 591 (9th Cir. 1957); *The Regina Corp. v. Federal Trade Commission*, 322 F.2d 765, 768 (3d Cir. 1963); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F.2d 273, 281 (2d Cir. 1952).

was not engaged in interstate commerce was "so wholly lacking in merit as to require no detailed discussion." *Accord*, *Rothschild v. Federal Trade Commission*, 200 F.2d 39, 42 (7th Cir. 1952); *Bernstein v. Federal Trade Commission*, 200 F.2d 404 (9th Cir. 1952).

I. The Commission's findings that petitioner's forms are misleading and have the tendency and capacity to deceive are supported by substantial evidence.

The Commission's evaluation of Floersheim's forms should be affirmed on the basis of well-established principles which have been recognized and applied by this Court. Commission findings, if supported by substantial evidence, are conclusive. The meaning of the forms and their tendency or capacity to mislead or deceive are questions of fact to be determined by the Commission which should be upheld by the Court unless clearly wrong.¹³ The Commission may draw its own inferences from an examination of the forms themselves. It need not call witnesses who have been deceived. The question is the impression given by the forms as a whole; if they are capable of two meanings, one of which is false, they are misleading. If they can create a false impression, though literally true, they may be prohibited. It is immaterial that relatively trained or experienced individuals would not be misled. That some members of the public, which includes the ignorant, the unthinking and the credulous, may be deceived is sufficient to support the Commission's order.¹⁴ Actual deception need

¹³ As stated by this Court in *Stauffer Laboratories, Inc. v. Federal Trade Commission*, 343 F.2d 75, 78 (1965), "We cannot hold erroneous the Commission's finding as to what the advertisements stated and represented even if we were inclined to disagree with the Commission, which we are not."

And as held in *De Gorter v. Federal Trade Commission*, 244 F.2d 270, 273 (9th Cir. 1957), Commission findings supported by substantial evidence "are final even though the evidence is so conflicting that it might have supported the contrary had such findings been made" (Court's emphasis).

¹⁴ In *Feil v. Federal Trade Commission*, 285 F.2d 879, 887 n. 18 (9th Cir. 1960), this Court quoted with approval from *Aronberg v.*

not be shown, only the tendency or capacity to deceive. *Stauffer Laboratories, Inc. v. Federal Trade Commission*, 343 F. 2d 75, 78-80, 83 (9th Cir. 1965); *Feil v. Federal Trade Commission*, 285 F. 2d 879, 882-4, 887, 892 n. 19, 896 (9th Cir. 1960); *Mohr v. Federal Trade Commission*, 272 F. 2d 401, 405 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960); *Carter Products, Inc. v. Federal Trade Commission*, 268 F. 2d 461, 493-96 (9th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959); *Goodman v. Federal Trade Commission*, 244 F. 2d 584, 587-88, 600 n. 35, 603-04 (9th Cir. 1957); *De Gorter v. Federal Trade Commission*, 244 F. 2d 270, 272, 273, 282 (9th Cir. 1957).

More recently, in *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), the Supreme Court explained:

Moreover, as an administrative agency, which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation rests so heavily on inference and pragmatic judgment.

And in applying this principle to the question of whether television commercials made a particular representation, the Court stated (380 U.S. at 386):

Federal Trade Commission, 132 F. 2d 165, 167 (7th Cir. 1942), that "The law is not made for experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions."

And in *Stauffer Laboratories, Inc. v. Federal Trade Commission*, *supra*, note 13, at 83, this Court stated, "We think it sound doctrine to say that 'If the Commission * * * thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein," it is not for the courts to revise its judgment.' *Aronberg v. Federal Trade Commission*, 7 cir., 132 F. 2d 165."

* * * and, since this is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves, the Commission's finding should be sustained.

Floersheim's brief affords undue weight to the examiner's analysis of the documents in question and relies upon the examiner's findings as though they were under review by this Court (see Pet. Br. 9, 11-13, 22-24, 28). To the contrary, it is the Commission's findings that are under review, not those of the examiner. *Folds v. Federal Trade Commission*, 187 F. 2d 658, 660 (7th Cir. 1951); *Bond Crown & Cork Co. v. Federal Trade Commission*, 176 F. 2d 974, 979 (4th Cir. 1949). Notwithstanding any difference between the Commission and the examiner, the Commission's findings, if supported by substantial evidence, are conclusive. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951); *Art National Manufacturers Dist. Co. v. Federal Trade Commission*, 298 F. 2d 476, 477 (2d Cir. 1962), *cert. denied*, 370 U.S. 939 (1962), relying in part on *Goodman v. Federal Trade Commission*, 244 F. 2d 584, 601 (9th Cir. 1957); *accord*, *United States Retail Credit Association, Inc. v. Federal Trade Commission*, 300 F. 2d 212, 216-7 (4th Cir. 1962).

While the Supreme Court in *Universal Camera*, *supra*, held that the examiner's findings are to be considered, it stated that "The significance of his report, of course, depends largely on the importance of credibility in the particular case." Here, where the Commission's findings are based upon its own examination and evaluation of the forms (I 251), inconsistent findings by the examiner are of no particular significance.¹⁵

¹⁵ *Mannis v. Federal Trade Commission*, 293 F. 2d 774, 776 (9th Cir. 1961). While Floersheim relies upon the examiner's evaluation that he was an honorable person who did not intend to violate the law (Pet. Br. 26-7), Floersheim's good or bad faith is immaterial in determining whether representations are false or deceptive. *Feil v. Federal Trade Commission*, 285 F. 2d 879, 896 (9th Cir. 1960); *The Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765, 768 (3d Cir. 1963); *Koch v. Federal Trade Commission*, 206 F. 2d 311, 317 (6th Cir. 1953).

A. *There is substantial evidence to support the Commission's findings that petitioner's Payment Demand forms have the tendency and capacity to mislead and deceive recipients into believing that they come from the government or from some other official source or third party, rather than from the creditor.*

Payment Demand forms (CX 5-25) constitute the bulk of Floersheim's sales and are stressed in his advertising.¹⁶ As Floersheim testified (I 78-79), a Payment Demand form is just what it says—a demand for payment.

The envelopes in which the forms are sent to debtors simulate in appearance and format those used by the United States Government for official purposes. Compare Floersheim's envelopes (CX 23, 23A, 48B) with those of the United States Treasury Department (CX 46).¹⁷ In addition, the envelopes are postage-metered with a blue spread eagle, are sent to Washington, D.C., for mailing so they bear a Washington, D.C., postmark, and carry a Washington Building, Washington, D.C., return address. As established through the testimony of expert and lay witnesses (I 108, 137, 162; I-B 197-9, 212, 217, 221-2, 227-8, 234-5), many persons, particularly those of low income and low educational background, believe that anything from Washington, D.C., is connected with or is from the United States Government.

In *Bernstein v. Federal Trade Commission*, 200 F.2d 404, 405 (9th Cir. 1952), this Court considered the use of a Washington, D.C., address in conjunction with a question-

¹⁶ Of 2,900,000 forms sold in 1966, slightly over 2,000,000 were Payment Demand—the rest being skip tracer (I-B 417-18). In a form letter advertisement (CX 44A), Floersheim advises, "I am also sure you will prefer these [Payment Demand] to the skip or asset locator forms as they demand payment instead of information."

¹⁷ Floersheim conceded the similarity when he testified (I-B 306-07, 356-57, 410-11) that he had rejected envelopes, otherwise exactly like those he uses, which were the same shade of brown as Treasury Department envelopes because "they looked like the Treasury Department envelope." Floersheim cannot be heard to argue that, because of a slight variation in the shade of brown, his envelopes escape being similar to those of the Treasury Department.

naire "as a sort of clincher for the general implication that the inquiring party is engaged purely in business research or possibly even in the compilation of official statistics." And in *Bennett v. Federal Trade Commission*, 200 F.2d 362 (D.C. Cir. 1952), the court also recognized the tendency of a Washington, D.C., address to imply a connection with the United States Government.¹⁸ Here, the correspondence not only comes from Washington, D.C., but from the "Washington Building" itself. Still another factor is that most of the forms currently being used approximate the green color of United States Government checks. The portion of the green card on which the debtor's name and address is typed shows through the envelope window as does the payee portion of a government check (I-A 86; I-B 374. See CX 6, 9, 11, 13, 15, 15A, 16, 22).¹⁹ Also on the envelope is the legend:

<p>The Form Enclosed Is Confidential No One Else May Open</p>

This directive adds weight to the implication that the sender is the United States Government, or at least an official source with authority to impose the limitation.

The forms themselves (CX 10-19, 22) generally are headed:

¹⁸ See also *National Clearance Bureau v. Federal Trade Commission*, 255 F.2d 102 (3d Cir. 1958), where the court affirmed Commission findings in Docket 6648, 54 F.T.C. 509, 514-5, 523 (1957), to the effect that use of a Washington, D.C., mailing address, *inter alia*, implies that forms emanate from an agency of the United States Government.

¹⁹ Persons of low income frequently receive Internal Revenue refund checks because of their low income (I-A 135). Many poor people have various claims against the government, *e.g.*, workmen's compensation and disability benefits (I-A 138).

PAYMENT DEMAND
748 WASHINGTON BUILDING
WASHINGTON, D.C.²⁰

On others (CX 20, 21) it is stated:

Payment Demand
748 Washington Bldg.
Washington 5, D.C.

Requests Your Appearance in the office
of the creditor at the time specified.

In addition, most of the forms (CX 5-16, 19) prominently state:

NOTICE MAILED FROM WASHINGTON, D.C.
BY PAYMENT DEMAND

The forms, therefore, continue and enlarge upon the deception initially created by the envelopes by emphasizing that the demand for payment comes from Washington, D.C., and is made by Payment Demand. Under the circumstances, Payment Demand may be understood to be a part of the governmental complex in Washington or to be an official authority. Even to persons who might not be so misled, the form clearly represents that a third party, Payment Demand, is interested in the debt and in its collection.

The tendency to mislead and deceive recipients into believing that the forms emanate either from the United States Government or an official source is further accomplished by the authoritative and peremptory nature of the statements and demands contained therein.²¹

²⁰ On some forms (CX 5-9) the heading varies to read:

Mailed from:

PAYMENT DEMAND
WASHINGTON 5, D.C.

²¹ Floersheim's own sales literature (CX 40A) states that "Each form is designed as a directive to your debtor to come into your office and make arrangements to pay his obligation—or by mail."

The very designation of the forms as "directives" concedes that there is an implication the sender has authority to so direct.

On all forms the recipient is formally termed "Debtor" (CX 5-21) and, in elaborate black letter or Gothic form type which simulates legal documents, some forms are entitled "Final Demand for the Payment of Debt" (CX 10-16, 18, 19, 21). The debtor is ordered to pay the debt or appear in the creditor's office as though this were the authoritative judgment of Payment Demand. Thus we find such directives as:

Take Notice That the AGENT (CREDITOR) OR ASSIGNEE—claims a just indebtedness from the DEBTOR ——— TO BE PAID on or before ——— (CX 15, 16).²²

The above amount is correct and payable.

The addressee must bring (mail) this form to the Creditors Office located ——— prepared for settlement. Settlement date only extended to — (CX 17, 20, 22).

You have 10 days to pay the amount of \$—— on the claim of ——. You are scheduled to appear in the CREDITORS (AGENTS) OFFICE located at — on or before — to pay the balance requested or give satisfactory reasons in PERSON why the AMOUNT has not been paid (CX 5-9, 15, 16).

The Addressee must bring this form to the Creditors (Agent's) Office located at — on or before — to pay the balance or give satisfactory reasons in PERSON why the AMOUNT has not been paid (CX 10-13).

THE DEBTOR (or Addressee) MUST BRING OR MAIL THIS FORM TO THE CREDITOR'S (or ASSIGNEE'S) OFFICE located at — on or before — (CX 14, 18, 21).²³

²² Others (CX 10-13, 18, 19, 21) simply state: "Take Notice that the above named Creditor (Agent) claims a just indebtedness from (DEBTOR)."

²³ Still additional examples of absolute directives are: "Bring this form with you. If unable to appear, send amount past due by mail to creditor's (agent's) (assignee's) office" (CX 5-13, 15-19, 21).

These illustrative excerpts from the Payment Demand forms, many of which are in the elaborate black letter, Gothic form type used in legal documents (see, *e.g.*, CX 10-16, 18-20), represent that Payment Demand, with governmental or other official authority to do so, has passed upon the creditor's claim and, finding it to be a "just indebtedness," "correct and payable," has adjudged that the debtor must make payment or appear before the creditor to make alternative arrangements. Indeed, Payment Demand is represented to have such absolute authority that Floersheim has prepared forms (CX 20, 21) with "Debtor's Stubs" on which the creditor is to provide the debtor with a certification that the debtor did appear at the creditor's office as required.

Floersheim has admitted (I-A 82-3; I-B 313-4, 421) that it is his intention that the debtor believes he is receiving something from a party other than the creditor. Proof that debtors do believe that a third party is interested in the debt and its payment is the fact that some debtors respond to the forms by making payment directly to Payment Demand in Washington (I-A 90-1). Indeed, so many recipients respond directly to Payment Demand as the party in interest that Floersheim sells follow-up forms for creditors to mail to the debtors in such situations. These forms continue and exploit the deception.²⁴ And see CX 54, where the creditor reads:

"IF MAILING PAYMENT, YOU MUST REFER TO FILE NO. _____. IF APPEARING IN PERSON, BRING THIS FORM WITH YOU" (CX 14).

"SEND AMOUNT PAST DUE BY MAIL TO CREDITORS OFFICE Complete questionnaire on reverse side unless full payment enclosed"

And on the reverse side is:

"All answers must be current and must be printed and returned at once" (CX 22).

"DO NOT PIN FOLD OR STAPLE" (CX 5-14, 17-19, 21, 22). This directive indicates that the form is important and must be returned in proper condition.

²⁴ One such form (CX 24) reads:

"YOUR LETTER TO PAYMENT DEMAND, WASHINGTON, D.C. PROMISING PAYMENT, HAS BEEN FORWARDED TO

tor wrote the debtor that if he had made his payments as promised “it would not have been necessary to resort to the *legal notice from Washington*” (emphasis supplied).²⁵

The tendency and capacity to deceive, apparent from the forms and envelopes themselves, is sufficient upon which to predicate a holding of violation (*supra*, pp. 18-19). While not required, the record also contains testimony of recipients who were deceived into believing that the demands for payment came from the United States Government or from a third party collection agency.²⁶

THIS OFFICE. YOUR AGREEMENT IS ACCEPTABLE ONLY IF RECEIVED AT THIS OFFICE AT THE ADDRESS BELOW ON OR BEFORE —.”

The other (CX 25) is as follows:

“TAKE NOTICE . . .

“YOUR LETTER TO PAYMENT DEMAND, WASHINGTON, D.C., PROMISING PAYMENT WAS ACCEPTED BY THIS OFFICE.

“YOUR FAILURE TO KEEP UP YOUR AGREEMENT FORCES US TO DEMAND PAYMENT FROM YOU IN THE AMOUNT OF \$—— TO BE PAID IN PERSON OR MAILED TO THE ABOVE OFFICE ON OR BEFORE — OTHERWISE WE MUST PROCEED WITHOUT FURTHER NOTICE”

²⁵ The tendency and capacity of the Payment Demand forms to mislead and deceive is further revealed by Floersheim’s own advertising brochure (CX 40). Here he attempts to counter reasons that have been presented to him for not using the forms, *inter alia*, “THEY SIMULATE A LEGAL DOCUMENT”; “THEY ARE ILLEGAL”; “THEY MISQUOTE OUR STATE LAWS” (see discussion of this deception, *infra*, pp. 27-29); “WE DON’T BELIEVE IN THIS KIND OF PRACTICE.”

The very fact that creditors have so questioned the forms conclusively demonstrates their tendency and capacity to mislead and deceive the relatively unsophisticated recipients, many of whom are uneducated and would fall into the category of ignorant, unsuspecting and credulous that the Federal Trade Commission Act was passed to protect (see *supra*, pp. 18-19).

²⁶ Manuel Gonzalez thought, from the Washington address and the form itself, that it was from the United States Government and that the Government was telling him he owed it \$1200. Even after a Legal Aid attorney explained that this was not from the Government, Gonzalez returned with an income tax refund form to prove

In *In re Floersheim*, 316 F.2d 423, 428 (9th Cir. 1963), this Court discounted Commission complaints that the skip tracer forms there considered²⁷ were too official-looking, simulated the color and design of checks and used peremptory language and a Washington, D.C., address. That case, however, was an action for criminal contempt where the sole issue was whether Floersheim had willfully violated an outstanding order to cease and desist. As this Court stated (316 F.2d at 428):

* * * The short answer to these complaints is that the cease or desist order, as drawn, does not forbid such acts or use.

This Court, therefore, was not passing upon the tendency and capacity of such acts and practices to mislead and deceive, but held only that they did not violate the outstanding order. And see *Bernstein v. Federal Trade Commission*, 200 F.2d 404, 405 (9th Cir. 1952), where this Court affirmed a finding of deceptiveness in connection with the use of a Washington, D.C., address.

Most Payment Demand forms (CX 5-16) contain the statement:

he did not owe the Government any money. And at the time of the hearing, he still thought it was a court requirement (I-A 144-8, 155-6; I-B 195-6).

Mrs. Yvonne Miller thought that the Payment Demand form she received was from a collection agency (I-A 143, 157-8).

Christopher Gonzalez thought that the Government was demanding that he pay his bill, and that if he did not, they would take away his furniture and car. His wife, Elida Gonzalez, also read the demand and told him that it was very important because it came from Washington and so they were required to pay. She thought it was a requirement to appear in court within ten days (I-B 208-12, 217, 221-28).

Richard Blackley, a school teacher, at first thought that it was from the United States Government, probably a GI insurance check. It was only after he read the form that he realized it was a demand to pay a bill (I-B 232-40). Clearly, a less educated person might have continued to believe that the form was from the Government.

²⁷ Petitioner's Payment Demand forms were not covered by the order to cease and desist and were not involved in the case.

Subject to the Laws of the (name of appropriate state).

A Creditor may request an Attorney-at-Law to attach (after Judgment) (before Judgment) Property such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary.

As the Commission found (I 257):

It is not disputed that [petitioner's] forms are sent to debtors in all parts of the United States. Yet, as exhibit 56, a summary of various state laws, demonstrates, the general statement on [petitioner's] forms fails to take into account numerous variations in state law, for example, providing exemptions for particular kinds of property or imposing limitations on wage or salary attachments. * * *

It seems clear that the sole purpose of including this catalog of creditors' rights is to intimidate and deceive the debtor, rather than to inform him of the legal rights of his creditor. Certainly any statement of a creditor's rights after judgment sent to a debtor against whom no judgment has yet been entered should include a notification that no judgment may be entered against the debtor unless he has first had an opportunity to appear and defend himself in a court of law.

While Floersheim's brief to this Court does not take issue with this finding, and thus waives any objection thereto,²⁸ this deceptive statement may be considered in connection with the other deceptive characteristics of the forms. The propensity to intimidate and deceive debtors as to the legal rights of their creditors is particularly strong since the statement is on a form that simulates a legal

²⁸ *Dower v. United Air Lines, Inc.*, 329 F.2d 684, 685 (9th Cir. 1964); *Chain Institute, Inc. v. Federal Trade Commission*, 246 F.2d 231, 235 (8th Cir. 1957), cert. denied, 355 U.S. 895 (1957); *Donnelly v. United States*, 276 U.S. 505, 511 (1928).

notice or demand (often captioned “Final Demand for the Payment of Debt”) from a governmental or other official source, which purportedly has passed judgment that the indebtedness is “just” or “correct and payable.” Further, the forms prominently state:

This Demand is made to give you a last opportunity to pay and to lay a foundation for action on said claim if the same is not paid within the time aforesaid (CX 10-13, 18, 19, 21).

or

This Demand is made to give you a last opportunity to pay before action is taken on said claim (CX 5-9, 15, 16).²⁹

Under the circumstances, the recipient may well believe that the formal Demand for payment constitutes the requisite legal action which lays the foundation, without more, for attachment of his property.³⁰ The overly broad statement of state law clearly tends to intimidate and deceive.³¹

B. There is substantial evidence to support the Commission's finding that petitioner's skip tracer forms have the tendency and capacity to mislead and deceive recipients into believing that they come from the government or from some other official source, rather than from the creditor.

The purpose of the skip tracer forms is to secure information about debtors, *e.g.*, location, place of employment, where they bank (I-A 88, 90). These forms (CX 27-36; I-A

²⁹ An additional variation is: “Take Notice that the Creditor or Assignee makes this Demand to give you a last opportunity to pay and to lay a foundation on said claim, if same is not paid within the time aforesaid” (CX 14).

³⁰ As a representative recipient testified, his wife explained to him that “it said we had to pay that money or they would take away the furniture, the car” (I-B 212).

³¹ As noted *supra*, p. 26, n. 25, even some of petitioner's prospective customers object that the forms “MISQUOTE OUR STATE LAWS!”

78-9) are mailed to the debtors or to other parties who may possess desired information (I-A 90, 388, 393).

The same type brown window envelopes in which Payment Demand forms are sent are used to mail skip tracer forms. The forms are similarly completed by the creditor and are sent to Floersheim for mailing from Washington, D.C., to the debtor or other source of information (I-A 88-9; I-B 301-2, 388, 393). Skip tracer forms are available in green so that again the color of a government check may show through the envelope window (CX 30, 34). Thus, all of the deceptive and misleading elements involved in mailing Payment Demand forms are present in mailing skip-tracers. The recipient is led to believe that he is receiving a communication from the United States Government or from some other official source in Washington, D.C. (See *supra*, pp. 21-22, for analysis of the deceptive elements).

The brown return envelopes Floersheim provides for the addressees' use in sending back the completed skip tracer forms are similarly misleading. Addressed as they are to Change of Address, Current Employment Records, or Claimant's Information Questionnaire, 748 Washington Building, Washington 5, D.C., they clearly imply that the recipients are responding to a branch of the United States Government or some other official party in Washington.³²

³² Floersheim's allusion (Pet. Br. 7, 12) to alleged Post Office Department approval of these names is not material. Before the Commission, petitioner conceded that he did not know the criteria used by the Post Office in giving such approval and that this would not be binding on the Commission (I-B 389-92; Oral Argument before Commission, pp. 32-34—reproduced at rear of I-B). Not having been raised before the Commission, the question should not be entertained by this Court. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 413-4 (1958); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-7 (1952); *De Gorter v. Federal Trade Commission*, 244 F.2d 270, 272 (9th Cir. 1957).

In any event, Post Office Department determinations do not preclude Federal Trade Commission action, since the agencies act under different statutes employing different standards. *Brandenfels v. Day*, 316 F.2d 375, 378 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 824 (1963). See also *Charles of the Ritz Dist. Corp. v. Fed-*

The deception is also present in the skip tracer forms themselves. They all prominently stress the 748 Washington Building, Washington, D.C., address (CX 27, 29-34, 36). They are designated "Questionnaire" (CX 31-34) or "Claimant's Information Questionnaire" (CX 36) and all peremptorily demand that the recipient furnish the requested information. Thus, all skip tracer forms (CX 27, 29-34, 36) require:

All answers must be current and must be printed and returned at once.

Other peremptory demands for information include:

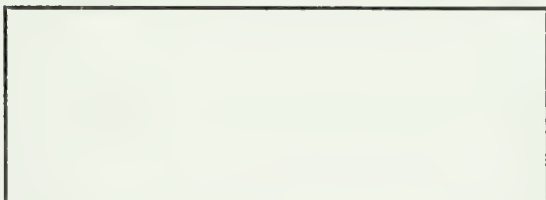
NOTICE YOU HAVE CHANGED EMPLOYERS

COMPLETE QUESTIONNAIRE AND
RETURN TO 748 WASHINGTON BLDG.
WASHINGTON, D.C. (CX 32, 33, 34)

This office has been advised that you failed to answer the original request—Answers must be kept current—

ANSWER ALL QUESTIONS BELOW

Give reason
here why first
form was not
returned as
requested



(CX 33, 34)

eral Trade Commission, 143 F.2d 676, 678 (2d Cir. 1944); *L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F.2d 954, 956 (7th Cir. 1951); *Waltham Precision Instrument Co. v. Federal Trade Commission*, 327 F.2d 427, 430-31 (7th Cir. 1964), *cert. denied*, 377 U.S. 992 (1964); *W. M. R. Watch Case Corp. v. Federal Trade Commission*, 343 F.2d 302, 304-5 (D.C. Cir. 1965), *cert. denied*, 381 U.S. 936 (1965).

CAUTION

THE QUESTIONS BELOW CANNOT BE ANSWERED BY ANYONE OTHER THAN ADDRESSEE (CX 36).

Fill Out Reverse Side of This Form and Return Within 5 Days (CX 27, 31).³³

The heading of the "Claimant's Information Questionnaire" form (CX 36) is in the same black letter or Gothic type which simulates a legal document as used on Payment Demand forms (see *supra*, p. 24). In addition, the title appears in an elaborately scrolled black frame, and the form directs: "FILL IN THIS FORM FOR IDENTIFICATION AND TO AID COLLECTION IN FULL FOR CLAIMANT." The claimant's name is not given. The only name on the form is the debtor's and he is directed to furnish his address, social security number, date of birth, spouse's name, bank references and his employer's name and address. The debtor, therefore, might well believe he is the "claimant" and that the information is required to identify himself as the one entitled.³⁴

The other skip tracer forms require similar information. See *Bernstein v. Federal Trade Commission*, 200 F.2d 404,

³³ Some of the other directives are:

"DO NOT PIN, FOLD, STAPLE OR MUTILATE" (CX 32-34).

This directive accentuates the authoritative source of the demand by implying that the recipient is obliged not to destroy the form, but must complete and return it intact. (See also CX 27, 29, 30).

"Addressee Complete Reverse Side" (CX 29, 30).

"ANSWER ALL QUESTIONS ON REVERSE SIDE OF THIS FORM" (CX 32-4).

³⁴ As explained by an attorney with the California Legal Assistance Office who worked extensively with poor people of limited education, many such persons have various claims against the government (*e.g.*, workmen's compensation, social security) and the information called for by CX 36 is similar to that required in these other situations (I-A 120-23, 132, 138).

405 (9th Cir. 1952), where this Court held that questionnaires seeking this type of data implied that the inquiring party was engaged in business research or in compiling official statistics, an implication that was "clinched" by the Washington, D.C., address.

While individual illustrative elements of deception have been demonstrated above, each of Floersheim's forms contains various combinations of these elements which make it even more deceptive. The Claimant's Information Questionnaire, for example, in addition to the particulars just recited, also has the Washington Building, Washington, D.C., heading and directs: "CAUTION. THE QUESTIONS BELOW CANNOT BE ANSWERED BY ANYONE OTHER THAN ADDRESSEE"; and "All answers must be current and must be printed and returned at once."

Similarly, the brown window envelopes, the return envelopes and the various skip tracer forms are not only individually misleading and deceptive, but the combinations in which they are used make the deception even more inevitable.³⁵ Clearly, as the Commission found (I 252), they "combine to conceal the true purpose of the request for information."

Florsheim asserts (Pet. Br. 5, 10-11, 13) that his skip tracer forms are not deceptive because they contain the statement, "The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government."

This, however, is in small print, much smaller than the peremptory demands and other misleading matter on the cards,³⁶ and is sandwiched between other statements so as to be inconspicuous (see, *e.g.*, CX 27, 29, 36). As the Commission found (I 252), the forms are often sent to persons

³⁵ This is also true of the combination of Payment Demand forms and envelopes in which they are sent (*supra*, pp. 21-25).

³⁶ Floersheim is in error in asserting (Pet. Br. 15) that the disclaimer is in as large print as anything else on the form except the form designation, the word "Notice" and, in some instances, the return address.

of low income having minimal formal education who “would be unlikely to notice [Floersheim’s] inconspicuous disclaimer or to understand its import.” (See I-A 136).

The statement clearly is insufficient to undo the overall deception of the forms and envelopes. Indeed, even if read, it does not disavow that the forms come from some official source. Further, the disclaimer is so worded and placed that, as exemplified by the experience of Mrs. Mossberg, creditors can easily block out everything from the disclaimer other than the words “United States Government” (See I-A 100-06, CX 48A).

Petitioner’s reliance (Pet. Br. 14) upon this Court’s discussion of the disclaimer in *In re Floersheim*, 316 F.2d 423, 427 (1963), is misplaced. This Court did not hold that the disclaimer served to make the forms nondeceptive; it held only that the language used did not violate the Commission’s order to cease and desist in Docket No. 6236. The Court went on to say (316 F.2d at 428):

If the Federal Trade Commission’s order is insufficient, then that body should reopen proceedings and modify its order. But such modification procedure, or its advisability, is not now before us.

As Floersheim’s counsel has conceded, the necessary size of a disclaimer is a matter of judgment.³⁷ And the Commission did not abuse its judgment in holding that a disclaimer sandwiched between other material, and in much smaller print than the deceptive statements in the forms, failed to overcome the overall deception. See *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F.2d 268, 271 (10th Cir. 1965), where the court held that the

³⁷ “MR. CHOTINER: * * * we have no objections to there being a disclaimer. * * * We have no objections to a disclaimer, except as a practical matter, what size shall it be? We have no objections to increasing the size of the disclaimer. We think it is large enough. * * * Where we draw the line becomes just a matter of judgment. That is the only thing” (Oral Argument before Commission, p. 27—reproduced at rear of I-B).

Commission's judgment that the particular placing of a disclaimer "is not sufficiently conspicuous" was a matter of expertise within the Commission's discretion not subject to judicial revision. And see *Independent Directory Corp. v. Federal Trade Commission*, 188 F.2d 468, 469-70 (2d Cir. 1951), and *Parker Pen Co. v. Federal Trade Commission*, 159 F.2d 509, 510-11 (7th Cir. 1946).³⁸

II. Petitioner received adequate notice that he was being charged with misrepresenting that a third party, unrelated to the creditor, was interested in the debt or in its collection.

The complaint (I 2-5) details Floersheim's method of doing business, including the use of the name "Payment Demand," the Washington, D.C., mailing address, and the prominent statement "Notice mailed from Washington, D.C. by Payment Demand." It also alleges that no creditor to whom the forms are sold has his place of business at the Washington, D.C., mailing address, and that Floersheim's sole business is that of selling forms to others for their use in securing information and collecting debts. The complaint, therefore, clearly sets forth the facts of a "third party" misrepresentation, *i.e.*, that Payment Demand, a party other than the creditor, has an interest in the debt or in its collection.

The conclusionary pleadings also encompass the "third party" issue by alleging generally that Floersheim fur-

³⁸ In *Independent Directory Corp.*, the court affirmed a Commission finding that certain order blanks were deceptive notwithstanding the inclusion of statements that revealed the truth.

In *Parker Pen Co.*, the court upheld the finding that "guaranteed for life" in an advertisement was deceptive as indicating a lifetime guarantee without any cost notwithstanding the inclusion, in a less prominent place on the page and in smaller print, of the condition that the owner pay a 35-cent service charge. In holding that it could not, as a matter of law, state that the Commission was arbitrary in finding that an inattentive or casual reader might be misled, the court relied upon the analogy that many States require that any limitation of liability in an insurance policy must be given equal prominence to the statement of liability.

nishes purchasers of the forms with the false, misleading and deceptive means of securing payment of delinquent accounts by subterfuge, in that use of the forms has the tendency and capacity to mislead and deceive persons to whom they are sent and to induce them to perform acts which they might not otherwise have done (I 5-6).

Not only does the complaint encompass the "third party" charge, but complaint counsel consistently took this position (I-A 19-20, 27, 32-35; I-B 325-26). Even the examiner, who ultimately held that the charge was not included, felt that the facts which were alleged covered such a practice (I-A 20, 25-6, 29-30) and warned petitioner that, in his opinion, the Commission could and probably would find this to be one of the issues (I-A 25, 36).

Floersheim's counsel at the very outset, during a prehearing conference, expressed his understanding of complaint counsel's position, stating, "I understand it clearly what Mr. Pope is proceeding on" (I-A 20), and he recognized that this was an issue to be determined by the examiner, the Commission and ultimately by the Courts (I-A 28, 31).³⁹ He stated that he would "not be taken by surprise" (I-A 36) and that "we are prepared to meet the issue even if we were to proceed to trial today, so we will not be surprised" (I-A 39). Indeed, he introduced evidence for the avowed purpose of defending against such a charge in the event it might ultimately be held that it was included.⁴⁰

³⁹ Floersheim's counsel unequivocally stated (I-A 31): "So there will be no misunderstanding about our contention in this regard I recognize that the Examiner may find, and the Commission may find and even the Court may find that the issue is raised regarding a third party mailing, as to whether it is permitted and that is raised by virtue of whatever pleadings are before the Examiner."

⁴⁰ "HEARING EXAMINER KAUFMAN: * * * Do I understand that this testimony that you've adduced as to third party representation where Dun & Bradstreet is used—the name is used—is that offered as a defense against such a charge if it is contained in the Complaint, third party representation?"

"MR. CHOTINER: It is offered in reply to such a charge if it is determined that there is encompassed within the pleadings the issue of third party mailings and alleged representations of third

It is well settled that administrative complaints need not meet the relatively strict standards required in court proceedings. *A. E. Staley Manufacturing Co. v. Federal Trade Commission*, 135 F.2d 453, 454 (7th Cir. 1943). There is no fatal variance between the complaint and the proof and findings where the practice objected to, though not particularly pointed up, falls within the thrust of the complaint. *Continental Wax Corp. v. Federal Trade Commission*, 330 F.2d 475, 478-9 (2d Cir. 1964). As stated in *Armand Co. v. Federal Trade Commission*, 84 F.2d 973, 974-5 (2d Cir. 1936), *cert. denied*, 299 U.S. 597 (1936):

At least in a contested case there must be an entire abandonment of the very substance of the dispute to which the defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet.

Here, there was no abandonment or substitution of issues. It is basically the same deception that "Payment Demand" is insisting upon payment, regardless of whether "Payment Demand" be deemed a part of the United States Government, another official authority, or simply a third party, other than the creditor, who is interested in the debt and its collection. Petitioner was at all times aware that it might be held that the "third party" issue was included and petitioner introduced the evidence he felt was appropriate to refute the charge.⁴¹ Further, since the evidence sup-

party interests, so that we have not been foreclosed. In other words, it's our contention and position, first, that the issue of third party mailing or third party representation of interest in the subject is not encompassed within the pleadings, but we do offer the evidence so that if the ruling should be adverse to our contention there will be evidence in the record" (I-B 324-5).

The examiner summarized the matter, without objection by petitioner, as follows (I-B 326): "All right. Then I know where we are. The Commission contends there is such an issue as to third party representation; the [Petitioner] contends there isn't, but [Petitioner], nevertheless, is adducing evidence to meet it."

⁴¹ See *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F.2d 694, 699-700 (1964), where this Court held that

porting the findings of "third party" misrepresentation was clearly admissible in support of the other charges, and petitioner was given full opportunity to meet the alleged expanded charge, there can be no prejudice. See *J. B. Williams Co. v. Federal Trade Commission*, 381 F.2d 884, 888 (6th Cir. 1967); *Federated Nationwide Wholesalers Service v. Federal Trade Commission*, 398 F.2d 253, 258 (2d Cir. 1968).

III. The Commission was not estopped from issuing its complaint with regard to petitioner's unfair and deceptive acts and practices.

There is no merit to Floersheim's assertion (Pet. Br. 34-8) that the Commission's rules require that it can question Floersheim's conduct only by reopening the prior proceedings,⁴² and that it should be estopped from proceeding under the subsequently issued complaint. As the Commission observed (I 248-9):

* * * The Commission's choice of procedure would seem to be a matter of indifference to [petitioner], since no substantial rights of his could possibly be impaired thereby. Under either procedure [petitioner] would be, and is, entitled to a full evidentiary hearing to resolve disputed issues of fact and law, to a decision based on the record, and to judicial review of the Commission's decision in an appropriate court of appeals. More particularly, the procedure chosen by the Com-

even if the Commission's findings enlarged the scope of injury caused by a particular practice beyond what was charged in the complaint, no prejudice was shown where the petitioner did not apply for leave to adduce pertinent evidence to counter the broader finding. Similarly, here, there can be no prejudice where petitioner was allowed to introduce the evidence he wanted to introduce.

⁴² The rule relied upon by Floersheim, in effect when the Commission issued its complaint in this case, imposes no such requirement. It merely recites the Commission's authority to reopen a proceeding and the procedure to be followed. The rule, then Section 3.28 of the Commission's Rules of Practice for Adjudicative Proceedings, 16 CFR 3.28 (Supp. 1967), is reproduced in the addendum to this brief, p. 1a.

mission entitles [petitioner] to an evidentiary hearing before a hearing examiner whose initial decision must be “based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence,” and must include “findings * * * and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record.” Rules of Practice, Section 3.51(b). [Petitioner’s] right of review both before the Commission and before an appropriate court is also guaranteed. How [petitioner] is, or could be, prejudiced by our choice of this procedure remains a mystery.

And Floersheim’s brief to this Court contains no assertion of prejudice.

The instant case deals with acts, practices and forms utilized subsequent to the date of issuance of the prior order. The nature of Floersheim’s business has shifted to the extent that he now stresses and deals primarily in “Payment Demand” forms, a type of form not involved in the prior case. The prior case dealt solely with skip tracer forms. By 1966, however, over 2,000,000 of some 2,900,000 forms sold were “Payment Demand” forms. Only 766,000 were skip tracer forms (I-B 417-18; CX 44A). A further misrepresentation not involved in the prior case was Floersheim’s assertion that the Commission had approved his Payment Demand forms, an aspect of the case not argued in Floersheim’s brief.

It is well established that new violations support new proceedings, *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 152 (1942); *Exposition Press, Inc. v. Federal Trade Commission*, 295 F. 2d 869, 872 (2d Cir. 1961); *J. U. Martin Corp. v. Federal Trade Commission*, 346 F. 2d 147 (3d Cir. 1965), and the situation is not changed because there is an outstanding order. No greater public interest is required to reopen an order than to bring a complaint in the first place. The function of the Commission is the same in both instances. *Elmo Co., Inc. v. Federal Trade*

Commission, 389 F.2d 550, 551-2 (D.C. Cir. 1967). And see *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F.2d 268, 269-270 (10th Cir. 1965), and *Exposition Press, Inc. v. Federal Trade Commission*, 295 F.2d 869, 872 (2d Cir. 1961), where orders were sustained which were issued under new complaints notwithstanding prior outstanding orders.

Floersheim's reliance (Pet. Br. 37) upon *Elmo Division of Drive-X Co., Inc. v. Dixon*, 348 F.2d 342 (D.C. Cir. 1965), is misplaced. There, Elmo and the Commission had entered into a consent order *agreement* in 1952 which provided that the consent order could be set aside in whole or in part only under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice, then in effect.⁴³ As explained by the court, 348 F.2d at 343, that rule "provided for a reopening procedure whereby the Commission could set aside the consent settlement or any severable part thereof on finding a change of law or fact or that the public interest so required, and could *thereafter* undertake corrective action by adversary proceedings under the original or a new complaint as to any acts or practices not prohibited by any remaining provisions of the settlement" (court's emphasis). The court held, 348 F.2d 345, that the incorporation of the rule into the consent agreement gave Elmo a vested right to the reopening rehearing procedure provided by the rule, before any corrective action could be taken.

Here, unlike the situation in *Elmo*, there was no consent agreement which gave Floersheim a vested right to a reopening procedure, as was provided in the 1952 special rule applicable only to consent agreements. Further, the rule *allowing* reopening of orders such as the one outstanding against Floersheim contains no such requirement.⁴⁴ In

⁴³ 16 Fed. Reg. 6503 (1951); revoked effective May 21, 1955, 20 Fed. Reg. 3055. See addendum to this brief, p. 2a.

⁴⁴ It is significant that, even under the rule applicable in *Elmo*, once the required hearing was held which resulted in a determination to set aside in whole or in part the prior order, the Commission

addition, the present complaint deals, for the most part, with matters not covered by the prior order. The Commission, therefore, in its allowable discretion, determined to issue a new complaint rather than reopen the prior proceedings (see I 249).

Floersheim's recitation (Pet. Br. 35) that the Commission did not revoke its approval of reports of compliance filed pursuant to the prior order to cease and desist has no bearing. Section 3.26(c) of the Commission's former Rules of Practice (now Section 3.61(d); 16 CFR 3.61(d)), upon which Floersheim relies, pertains to Commission action against a respondent *for violation of an order* where a party has acted in reliance upon Commission approval of a report of compliance.⁴⁵ It has no application to the issuance of a new complaint which is an action for violation of Section 5 of the Federal Trade Commission Act, not for violation of an outstanding order.⁴⁶

was free "by adversary proceedings pursuant to the original complaint, or a new or amended and supplemental complaint" to undertake corrective action. (See addendum to this brief, p. 2a).

⁴⁵ "The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval" (16 CFR 3.61(d)).

⁴⁶ This is a material difference. An action for violation of an order contemplates "a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States" (Federal Trade Commission Act, Sec. 5(l), 52 Stat. 114; 64 Stat. 21, 15 U.S.C. 45(l)); or an action for contempt may be instituted in a court of appeals for violation of its order of affirmance and enforcement. On the other hand, a new complaint may at most culminate in an order

Not only was revocation of the “approval” of the prior reports of compliance unnecessary, but it would have been inappropriate. The first “approval” was a letter from the Commission’s Assistant General Counsel for Compliance, who did not purport to speak for the Commission. He merely advised that “in my opinion” the *forms demanding payment*, which were *the only forms submitted* with the report of compliance, “do not violate the Commission’s modified order, inasmuch as they do not request any information concerning delinquent debtors” (CX 2; emphasis supplied). The Assistant General Counsel’s letter, therefore, did not even constitute his approval of the collection forms, let alone Commission approval.⁴⁷

The second report of compliance upon which Floersheim relies (CX 3A-3QQ) was filed in August 1963, following this Court’s holding that various aspects of Floersheim’s skip tracer forms challenged by the Commission were not proscribed by the outstanding order to cease and desist. In addition to pertinent skip tracer forms, this report also included some Payment Demand forms. In accordance with this Court’s decision, the Commission advised that the

to cease and desist which does not punish or exact compensatory damages, but is prospective only—being purely remedial and preventative. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Drath v. Federal Trade Commission*, 239 F.2d 452, 454 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 917 (1957).

⁴⁷ Rather than constituting a determination that the forms complied with the order or otherwise approving them, this letter clearly advised that the order did not pertain to such forms “as they do not request any information concerning delinquent debtors.” The forms submitted simply were not the subject of the order. Mohr and Floersheim could just as well have submitted forms claiming cures for baldness or cancer and then claimed, under a response similar to CX 2, that the Commission had approved such forms and determined that they were in compliance with the order to cease and desist. Even if this letter were deemed to constitute approval by the Assistant General Counsel, the Commission would not be estopped from taking contrary action. *Mohr v. Federal Trade Commission*, 272 F.2d 401, 406 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960); *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F.2d 268, 270 (10th Cir. 1965).

report set forth actions that complied with the order to cease and desist (CX 4). Again, this did not constitute approval of the Payment Demand forms that were forwarded with the report of compliance and it did not express Commission approval of the skip tracer forms except that they were in compliance with the order to cease and desist as construed by this Court. Indeed, the Commission had already announced its disapproval of the skip tracer forms by instituting the criminal contempt proceeding in this Court. Having lost that case, the Commission was obliged to accept Floersheim's report of compliance.

In issuing its new complaint, the Commission was not changing its mind as to what constituted compliance with the prior order. To the contrary, it was acting to stop practices not covered by that order. Not only was there no need to revoke acceptance of reports of compliance filed under the prior order, but such revocation would have been inconsistent with this Court's decision. And the complaint gave Floersheim full notice of the Commission's position.

IV. The Commission has not abused its discretion in its formulation of an order to cease and desist.

In *Carter Products, Inc. v. Federal Trade Commission*, 268 F.2d 461, 498 (9th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959), this Court stated the Commission's responsibility in formulating an appropriate order to cease and desist, as follows:

The Commission is the expert body to determine *what remedy* is necessary to eliminate the unfair and deceptive practices disclosed by the record, and it has wide latitude for judgment. Shaping a remedy is essentially an administrative function. Congress has entrusted the Commission with the responsibility of selecting *the means* of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence. Here, the Commission had discretion to fashion a remedy of a civil nature to attain the desired goals, and its choice fell within an allowable

area of its discretion. Only in cases where the remedy selected has no reasonable relation to the unlawful practices found to exist, should a reviewing court interfere (Court's emphasis).⁴⁸

To be effective, orders to cease and desist may impose a greater burden than the precise scope of violations. "[T]hose caught violating the Act must expect some fencing in." *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 431 (1957). "If the Commission is to obtain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

These principles conclusively dispose of Floersheim's efforts (Pet. Br. 21-22, 27-28) to limit the order to the specific forms used in the past, and are particularly pertinent in the present case. When the original order to cease and desist was issued, Floersheim construed it so narrowly that the Commission was impelled, in the public interest, to modify it in order to stop the continued tendency of his skip tracer forms to mislead and deceive (see *supra*, p. 2, and *Mohr v. Federal Trade Commission*, 272 F.2d 401, 404-05 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960)). After the modified order was affirmed by this Court, Floersheim changed the emphasis of his business to Payment Demand forms which were not covered by that order (*supra*, p. 39). While absolved from criminal contempt with respect to his skip tracer forms, Floersheim came so close to the line that this Court "hazard[ed] the hope that [Floersheim would] take such a long step forward in voluntary compliance with

⁴⁸ See *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392-93 (1959); *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473-74 (1952); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *Mannis v. Federal Trade Commission*, 293 F.2d 774, 778 (9th Cir. 1961); *Safeway Stores, Inc. v. Federal Trade Commission*, 366 F.2d 795, 805 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967).

the language and spirit of the order he is required to obey whether he likes it or not, that this seven-year old litigation may be finally terminated, and will not be before us again.” *In re Floersheim*, 316 F.2d 423, 428 (9th Cir. 1963).

The examiner noted that, just as some people are “accident prone,” Floersheim is “violation prone” (I 132). The Commission’s order is directly responsive to the violations of law found. It does no more than prohibit the types of deception practiced by Floersheim in the past. There is no basis for Floersheim’s efforts to secure a narrower order, particularly in view of his past history of violations and propensity to violate the law. For “in the exercise of [its] discretion” in formulating appropriate remedies, “the Commission can properly consider many factors, such as the frequency and duration of the violations, the business and competitive history of the respondent, including evidence of past violations, and the likelihood that the respondent knew, or should have known, that its conduct was unlawful.” *Joseph A. Kaplan & Sons, Inc. v. Federal Trade Commission*, 347 F.2d 785, 789 (D.C. Cir. 1965). *Accord*, *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523, 532-33 (5th Cir. 1963); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 429 (1957).

Floersheim (Pet. Br. 21, 22-25, 28-31) would appraise the scope of the Commission’s order to cease and desist on the basis of the examiner’s evaluation of what was false and deceptive. Again, Floersheim has forgotten that the Commission’s findings are here on review, not those of the examiner (see *supra*, p. 20). And the Commission’s order is clearly reasonably responsive to the types of violation found by the Commission, including those which Floersheim has not challenged in its brief to this Court.⁴⁹

⁴⁹ These consist of the findings (1) that Floersheim misrepresented that his Payment Demand forms have been approved by the Commission or were deemed to be in compliance with the Commission’s prior order against Floersheim, and (2) that Floersheim’s Payment Demand forms intimidated and deceived debtors as to their creditors’ rights to attach debtors’ property and income (I 256-7).

Finally, Floersheim asserts (Pet. Br. 21-22, 24, 26, 28, 31) that the order would preclude him from mailing forms from Washington, D.C., and would drive him out of business. As the Commission noted (I 262-3):

* * * This objection is largely hypothetical at the present time since the order does not in terms require that [Floersheim] cease doing business in Washington, D.C., and since [Floersheim] has not shown that this will be the predictable result of the order. We do not hold that [Floersheim] is barred from doing business in Washington, D.C., or from using a Washington, D.C., mailing address if there is a business reason for so doing and if affirmative disclosures made in connection with its use prevent it from being misleading or deceptive; we hold only that on the congeries of facts adduced in this record, [Floersheim's] present use of that address is clearly deceptive and that he must take affirmative steps to terminate the deception. It is for [Floersheim] to comply in any way he deems fit. If his business judgment dictates that he cease doing business here rather than make the disclosures we require in connection with his use of a Washington, D.C., address, that decision is his and not ours; it is not required by our order.

And in *American Medicinal Products, Inc. v. Federal Trade Commission*, 136 F. 2d 426, 427 (9th Cir. 1943), this Court, in passing upon an objection to an affirmative disclosure requirement, observed:

* * * The order does not require petitioners to reveal anything. It requires them to cease and desist from disseminating false advertisements, particularly those described in the order, but does not require them to advertise at all. If petitioners do not choose to advertise truthfully, they may, and should, discontinue advertising.⁵⁰

⁵⁰ Other cases which uphold the propriety of requiring an affirmative disclosure include *Mohr v. Federal Trade Commission*,

Similarly, the order here does not require Floersheim to discontinue his business of selling forms and otherwise engaging in the business of securing information concerning delinquent debtors, or assisting in the collection of delinquent accounts. All the order requires is that he conduct his business in a truthful and nondeceptive manner.

CONCLUSION

For the foregoing reasons the Commission's order to cease and desist should be affirmed and enforced in its entirety.⁵¹

Respectfully submitted.

JAMES McI. HENDERSON,
General Counsel.

J. B. TRULY,
Assistant General Counsel.

ALVIN L. BERMAN,
Attorney,
Attorneys for the Federal Trade Commission.

Washington, D.C. 20580

February 1969

272 F. 2d 401, 405 (9th Cir. 1959), *cert denied*, 362 U.S. 920 (1960); and *Kirchner v. Federal Trade Commission*, 337 F. 2d 751, 753 (9th Cir. 1964).

⁵¹ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Sec. 5(c), 52 Stat. 113, 15 U.S.C. 45(c).

ADDENDUM

**FEDERAL TRADE COMMISSION RULES OF PRACTICE
FOR ADJUDICATIVE PROCEEDINGS
(Section 3.28, 16 CFR 3.28 (Supp. 1967))**

§ 3.28 Reopening.

* * * * *

(b) *After decision has become final.* (1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a complaint, should be altered, modified or set aside in whole or in part, the Commission will serve upon each person subject to such decision and order an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

* * * * *

(3) Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto, or it may serve upon the parties a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner. Unless otherwise ordered and insofar as practicable, hearings before a hearing examiner to receive evidence shall be conducted in accordance with Subparts C, D, E and F of this part. Upon conclusion of hearings before a hearing examiner, the record and the hearing examiner's recommendations shall be certified to the Commission for final disposition of the matter.

**FEDERAL TRADE COMMISSION RULES OF PRACTICE,
EFFECTIVE AUGUST 3, 1951
(Rule V, 16 Fed. Reg. 6503 (1951), revoked 20 Fed. Reg.
3055 (1955))**

V Complaints, defaults, consent settlements.

* * * * *

(f) Pursuant to a change of law or facts, or when the public interest so requires, a consent settlement may be altered, modified, or set apart in whole or in part upon consent of all parties. All consent settlements shall contain an agreement that if consent to a change desired is not obtained, the Commission or any respondent may file a motion in the case to set aside such consent settlement in whole or in part on the grounds of change of law or fact or that the public interest so requires; and after opportunity for hearing upon the issues formed, the Commission may, if it finds that a change of law or fact, or the public interest so requires, set aside the consent settlement or any part thereof which is separable from the remaining provisions without changing their effect. Thereafter, the Commission may, by adversary proceedings pursuant to the original complaint, or a new or amended and supplemental complaint, undertake corrective action as to any acts or practices not prohibited by any remaining provisions of the consent settlement.

NO. 22733

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 20 1969

SYDNEY N. FLOERSHEIM, an individual
trading and doing business as
FLOERSHEIM SALES COMPANY and NATIONAL
RESEARCH COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW ORDER OF THE
FEDERAL TRADE COMMISSION

PETITIONER'S REPLY BRIEF

FILED

FEB 20 1969

W. M. LUCK, CLERK

MURRAY CHOTINER
Suite 6, Dover Building
833 Dover Drive
Newport Beach, California
92660

Attorney for Petitioner



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ARGUMENT

I

IT IS THE DUTY OF THIS APPELLATE COURT
TO REVIEW THE DECISION AND ORDER OF THE
FEDERAL TRADE COMMISSION IN LIGHT OF
THE ENTIRE RECORD FROM BELOW, INCLUDING
THE HEARING EXAMINER'S RECORD, TO DE-
TERMINE IF THERE IS "SUBSTANTIAL

EVIDENCE" TO SUPPORT THAT DECISION AND
ORDER.

The Commission, in its brief, would have this court abdicate its judicial function to the "sound discretion" of the Commission. (See Commission's brief, pages 18, 20, 35, 43, and 45.) Throughout its brief, the Commission continuously urges that its findings are conclusive. However, the "conclusiveness" of the Commission's findings only comes into play if there is "substantial evidence" to back up the Commission's findings. This is made clear by the court in the case of Gelb vs. Federal Trade Commission, 144 F.2d 580 (2nd Cir. 1944), where it was stated:

"We are not unmindful of the statutory admonition that the Commission's findings as to the facts, 'if supported by evidence, shall be conclusive' 15 U.S. C.A. Sec. 45(c); Federal Trade Commission vs. Standard Education Society, 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141. But this provision must be interpreted as requiring substantial evidence as the basis of findings in order to render them conclusive. J.B. Lipencott Company vs. Federal Trade Commission, 3 Cir. 137 F.2d 490, 491 and authori-

ties there cited."

Thus, it should be clearly understood that the purpose of the appeal to this court is to determine whether there is "substantial evidence" to support the Commission's Decision and Order and whether or not the Commission acted unreasonably, arbitrarily and capriciously in its order. We would not impose upon this honorable court's time and wisdom merely to have the Commission inform the court that it is the "expert in the field" and that therefore its Decision and Order must, of necessity, be correct. The duty of the Courts of Appeals in the review of administrative agency decisions was clearly set forth by the Supreme Court in the case of Universal Camera Corporation vs. National Labor Relations Board, 340 U.S. 474, 489-490 (1951):

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decision than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them the responsibility for assuring that the

board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the courts of appeals. The board's findings are entitled to respect; but they must nevertheless be set aside when the record before a Court of Appeals clearly precludes the board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The Commission, throughout its brief, insists that Petitioner's reliance upon the hearing examiner's findings and analysis and the examiner's findings themselves are irrelevant and "of no particular significance" and that it is the Commission's findings that are under review and not those of the hearing examiner. (See Commission's brief, pages 20 and 45.) However, the cases are clear that in a review of the Federal Trade Commission's rulings the "entire record" of the proceedings below must be considered by the reviewing court. In

fact, the very case cited by the Commission as authority for the fact that it is the Commission's findings that are under review and not those of the examiner makes clear the error of the Commission's argument that the hearing examiner's findings and analysis are irrelevant:

"In their brief counsel for the Commission state the findings of the trial examiner are of no interest to this court, implying, we assume, that we are not to give them any consideration. We do not agree with that statement, although we recognize that it is the Commission which has the ultimate responsibility of finding the facts and that it is the findings of the Commission that we are authorized to review.

"Our duty is to ascertain whether on the record as a whole there is substantial evidence to support the findings of the Commission. (Footnote 1: Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A. Sec. 1001 et seq.) In a very recent case involving the findings of the Labor Board, Universal Camera Corp. vs. N.L.R.B., 151, 71 S.Ct. 456, 457, the Supreme Court said: '*** Surely an examiner's

report is as much a part of the record as the complaint or the testimony. ***'

"Also: 'It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.' And further: '***Nothing suggests that reviewing courts should not give the examiner's report such probative force as it intrinsically commands.***'

"The court also said: 'We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the board and its examiner disagree. We intend only to recognize that evidence support-

ing a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. ***

(Footnote 2: Although in the Universal Camera case, supra, the court was considering Labor Board findings and order, the same rule is applicable to findings of the F.T.C. The court there said:

'It would be mischievious word-laying to find that the scope of review under the Taft-Hartley Act (29 U.S.C.A. Sec. 141 et seq.) is any different from that under the Administrative Procedure Act.

*** And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing administrative action subject to the Administrative Procedure Act.')

Folds vs. Federal Trade Commission,

Petitioner took much care in his opening brief to point out to the court the hearing examiner's findings and analyses (much to the dislike of the Commission, as pointed out in its Reply Brief) and the manner in which these findings and analyses were diverse and adverse from those of the Commission itself. Petitioner's purposes for pointing out these differences are obvious and they are two-fold: (1) To help point out to the court the evidence in the record which is contradictory to the findings and rulings of the Commission, and (2) to point out to the court the unreasonableness, arbitrariness, and prejudice of the Commission which must have existed on its part to have reached such an adverse ruling to its own hearing examiner's findings and ruling. In the determination of whether or not there is substantial evidence to support the Commission's decision, the reviewing court must look to "all" of the evidence -- both supporting and contradictory -- which was presented to the hearing examiner:

"In reviewing the findings of the Commission we must consider the record as a whole. While the findings of the Examiner were certainly not binding upon the Commission, they are part of the record, and are entitled to considera-

tion in appraising the correctness of the ultimate findings of the Commission." Benrus Watch Company vs. Federal Trade Commission, 352 F.2d 313, 321 (8 Cir. 1965); Evis Manufacturing Company vs. Federal Trade Commission, 287 F.2d 831 (9th Cir. 1961); Minneapolis-Honeywell Regulator Company vs. Federal Trade Commission, 191 F.2d 786 (7th Cir. 1951).

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corporation vs. National Labor Relations Board, 340 U.S. 474, 488 (1951).

It is Petitioner's contention that there is no

deception in his practices in the operation of his legitimate business. (See Petitioner's Opening Brief, pages 8-20.) However, the hearing examiner made the following findings with regard to deception:

1. The brown window envelopes caused deception in that they appear to be from an official source. (C.T. 106)
2. The "skip-tracer" forms are an independent instrumentality of deception because the disclaimer thereon is too inconspicuous. (C.T. 106) (Footnote 1: The Commission's brief unjustifiably mis-states Petitioner's arguments regarding the skip-tracer forms in its Footnote 3 on page 5 of its brief.)
3. The payment demand forms in and of themselves are not deceptive since they plainly reveal a private indebtedness and a simple demand for payment. (C.T. 123)
4. The use by Petitioner on its Payment Demand forms of the statement of the creditor's rights was not actionable misrepresentation and the Examiner dismissed the charge. (C. T. 103)
5. The issue of third party authority had not been sufficiently raised by the complaint and the hearing examiner held that the

complaint did not encompass such a charge.

(C.T. 85-87, 115, 121)

Petitioner, by pointing out the hearing examiner's findings at this point, does not concede that any deception exists in his practices, but such findings are set forth at this point to illustrate that evidence before the Commission -- which was the same evidence that was before the hearing examiner -- does not support the broad, all-inclusive and destructive order of the Commission.

The Commission, under the facts presented to it -- which were the same facts that were before the hearing examiner -- should have, at the very most, sustained the finding of the examiner. "And while the findings of an examiner are not 'as unassailable as a master's' (universal Camera Corp. vs. National Labor Relations Board, 340 U.S. 474, 492, 71 S.Ct. 456, 467), where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary. Folds vs. Federal Trade Commission, 7 Cir. 187 F.2d 658, 661." Minneapolis-Honeywell Regulator Company vs. Federal Trade Commission, 191 F.2d 786 (7 Cir. 1951).

II

AN ORDER BY THE COMMISSION WHICH

FAR EXCEEDS THAT WHICH IS "REASON-
ABLY NECESSARY" TO PROTECT THE PUBLIC
IS UNREASONABLE, ARBITRARY, AND IS AN
ABUSE OF THE COMMISSION'S DISCRETION.

It has long been held that the orders of the Federal Trade Commission should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and the public. Federal Trade Commission vs. Royal Milling Company, 288 U.S. 212 (1932). And, in addition, it has long been held that Commission findings or rulings which are arbitrary or capricious cannot be sustained by an appellate court. Benrus Watch Company vs. Federal Trade Commission, 352 F.2d 313 (8 Cir. 1965); Corn Products Refining Company vs. Federal Trade Commission, 324 U.S. 726 (1963); Continental Wax Corporation vs. Federal Trade Commission, 330 F.2d 475 (2 Cir. 1964); National Trade Publications, Inc. vs. Federal Trade Commission, 300 F.2d 790 (8 Cir. 1962); United States Retail Credit Association vs. Federal Trade Commission, 300 F.2d 212 (4 Cir. 1962); Chain Institute, Inc. vs. Federal Trade Commission, 246 F.2d 231 (8 Cir. 1957).

In the present case, it was found by the hearing examiner that the order that was "reasonably necessary" to protect the public was such that Petitioner was ordered to: (1) Use only white envelopes in connection with his skip-tracer and/or collection forms; (2) Place

a disclaimer on the skip-tracer forms in a prominent place, in lettering at least as large as the largest lettering (except for caption) used on the forms;

(3) Not represent, directly or by implication, that any of Petitioner's Payment Demand forms have been approved by the Federal Trade Commission; and (4) Not misrepresent Federal Trade Commission or court approval of any of petitioner's envelopes, forms or other material. (C.T. 137-140).

Again, it is not Petitioner's intention here to concede that any deception exists in his practices, nor that the hearing examiner's order was valid when it is considered that no deception actually does exist. Petitioner simply intends to point out that the hearing examiner, after long and careful consideration of the facts, came to the conclusion that all that was "reasonably necessary" to protect the public was those items as set forth in his order. It is Petitioner's contention that this case is a perfect example of what the Supreme Court recognized when it stated that "*** Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's (Commission's) ***." (Emphasis and parentheses added) Universal Camera Corporation vs. N.L.R.B., 340 U.S. 474.

"The statute gives this court power not only to affirm or reverse but also to modify the orders of the Commission. 15 U.S.C.A. Sec. 45 (c) and (d). This power to modify extends to the remedy. Federal Trade Comm. vs. Royal Milling Co., et al., 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706; Carter Products, Inc., et al. vs. Fed. Trade Comm., 1951, 186 F.2d 821." Folds vs. Federal Trade Commission, 187 F.2d 658, 661 (7 Cir. 1951.) Thus, if this court were to agree with the hearing examiner that some limited deception existed in Petitioner's practices (in spite of Petitioner's many points to the contrary), this court should simply modify the Commission's order to comply with the hearing examiner's order.

III

PUBLIC POLICY AND INTERESTS REQUIRE
THAT PETITIONER BE ALLOWED TO CONTINUE
HIS LEGITIMATE BUSINESS OF SELLING
FORMS TO CREDITORS.

As was pointed out in Petitioner's Opening Brief at pages 28-31, the hearing examiner in his initial decision recognized the public interest in allowing Petitioner to continue his business.

It is a fact of life that consumer credit has been increasing in this country at a rate of 0.5 billion dollars annually. 51 Fed. Reserve Bull. 1152 (1965).

Accompanying this enormous increase in credit that is extended is an increase in the number of instances where creditors are forced to bring some type of pressure upon the debtors in the collection of the accounts. The public has an interest in seeing that the methods of collection are both effective and inexpensive. First, it is important to note that it is economically sound to provide an effective and inexpensive means of collection of consumer debts. As the hearing examiner below recognized, "Moreover, it is obvious under our system that if debtors do not pay their debts the loss to creditors is shifted to other consumers or purchasers; or if the loss becomes so large as to be insurmountable, the result is bankruptcy for the creditors or at least going out of business." (C.T. 29-30) It is a simple principle of business that bad debts are an expense that must be borne either by the creditor or the public. If this expense becomes unreasonable, it is obvious that some of the burden will be shifted to the public.

Attempts are constantly being made by business and by other groups interested in the public welfare to reduce the cost of collecting these amounts from irresponsible debtors. 14 U.C.L.A. Law Rev. 879. Forms which Petitioner makes use of in his business have been found to be very inexpensive. The hearing examiner stated it very well in his initial decision:

"Skip-tracer and collection forms are necessary, it seems to the examiner, because of the small dollar amount of each indebtedness in many lines of trade, particularly as brought about by mass selling, which is so characteristic of our present free enterprise system. Obviously, lawyers cannot afford to take on accounts of this nature, or, if they do -- often as auxiliaries to collection agencies -- the amount of their fees and court costs tend to discourage further retention of the attorneys or other collection agencies which may have retained them. Moreover, the fees of collection agencies, even without forwarding to attorneys are not unsubstantial. Small businesses, which many people regard as of particular concern to the Commission, as well as middle-sized businesses, thus very often have to depend on collection efforts through collection forms, rather than utilizing collection agencies, with or without attorneys, or utilizing attorneys directly." (C.T. 128-129)

An additional expense which would be thrust upon the public if Petitioner is not allowed to continue his legitimate use of his collection forms, is the cost to the public of the many bankruptcies that result from other forms of collection efforts. Garnishment and other attachment proceedings are a prime cause of forcing debtors into bankruptcy. "Why So Many Bankruptcies in Oregon?", 40 Journal of National Conference of Referees in Bankruptcy, 78 (July 1966). Lawsuits against debtors also aid in the encouragement of bankruptcies. 14 U.C.L.A. Law Rev. 879. The method of using Petitioner's collection forms does not bring this type of pressure upon the debtors. Their wages are not touched and their property is not attached.

Second, it is of interest to the public to see that creditors (businessmen) are allowed to collect debts legitimately owed. It is certainly important to see that businesses survive and extend credit, and one element necessary to insure their survival is to permit creditors to pursue their rights of collection even though the results might be emotionally disturbing to others. This privilege arises from the relationship between the debtor and the creditors. "The debtor has voluntarily chosen to join the modern trend toward credit living, and, in so doing, has impliedly assented to pressure from those who have a legitimate interest in the timely payment of

his debts. Gouldman-Taber Pontiac, Inc. vs. Zerbst, 213 Ga. 682, 684, 100 S.E.2d 881, 883 (1957)." 17 Hast. L. J. 369, 371.

In order to protect these public interests in the collection of debts, the order of the Federal Trade Commission, as pointed out in Petitioner's opening brief (C.T. 21-22, 28-31) effectively destroys this method of collection and should be reversed.

CONCLUSION

It is respectfully submitted for the above reasons and for the reasons set forth in Petitioner's Opening Brief that the order of the Federal Trade Commission is erroneous and void. This court should vacate that order and dismiss the complaint.

Respectfully submitted,

MURRAY M. CHOTINER

Attorney for Petitioner



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,)
California State Prison,)
San Quentin, California,)
Respondent-Appellant,)
vs.)
VERON ATCHLEY,)
Petitioner-Appellee.)

No. 22735

APPELLANT'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

WILLIAM D. STEIN
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-2847

Attorneys for Appellant

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JIM B. LUCK, CLERK

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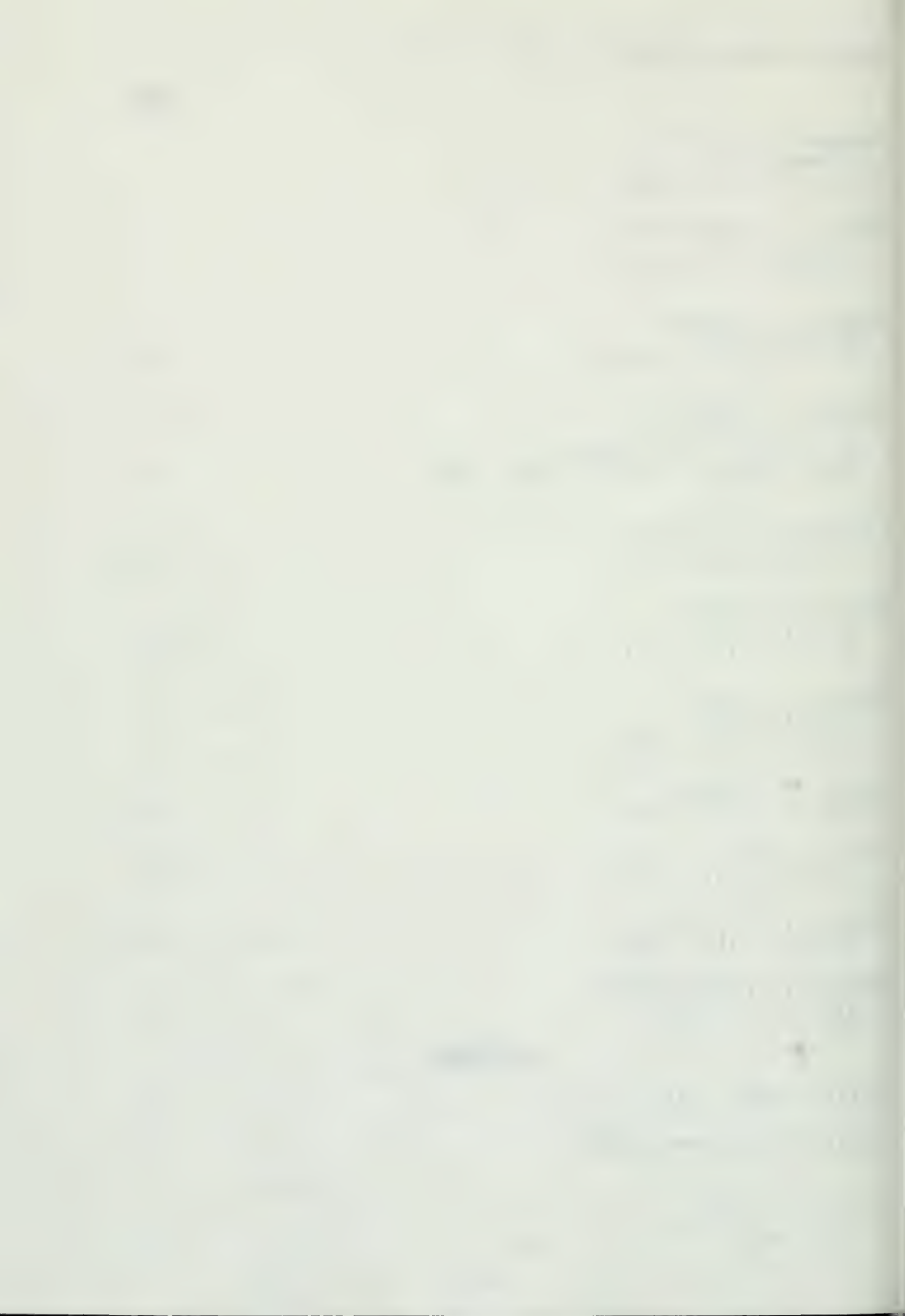
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UNITED STATES COURT OF APPEALS

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Respondent-Appellant,)
vs.)
VERON ATCHLEY,)
Petitioner-Appellee.)

No. 22735

APPELLANT'S BRIEF

JURISDICTION

The jurisdiction of this Court to entertain this appeal from the United States District Court's order granting appellee's petition for a writ of habeas corpus is conferred by Title 28, United States Code, section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has been issued.

STATEMENT OF THE CASE

A. Proceedings in the state court:

Appellee, Veron Atchley, was convicted after a jury trial in the Superior Court of the State of California for the County of Butte of murder in the first degree and the death penalty was imposed (TR 30-31).^{1/}

An automatic appeal from this judgment was taken

1. "TR" refers to the transcript of record on appeal from the United States District Court filed with this Court on March 12, 1968.

to the California Supreme Court and was affirmed on December 1, 1959, in an opinion which is reported at 53 Cal.2d 160, 346 P.2d 764 (1959) (TR 46).

B. Proceedings in federal court:

Appellee sought and was granted a writ of certiorari by the United States Supreme Court following the California Supreme Court's affirmance of his conviction. Briefs were filed and the matter was orally argued following which the Court, based upon its examination of the record, concluded that the totality of the circumstances did not warrant bringing the case before it, and accordingly, dismissed the writ. Atchley v. California, 366 U.S. 207 (1961) (TR 46).

Appellee then applied to the United States District Court for the Northern District of California for a writ of habeas corpus. Judge Sweigert denied the writ and petitioner appealed to this Court which affirmed the denial. Atchley v. Dickson, 338 F.2d 1014 (9th Cir. 1964) (TR 46).

The instant action commenced when appellee filed an application for writ of habeas corpus in the United States District Court for the Northern District of California on March 10, 1967 (TR 2). An order to show cause was issued by the Honorable Robert Peckham (TR 22) and counsel was appointed to represent petitioner (TR 41). Supplemental returns and traverses were filed following which the District Court ordered that a writ of habeas corpus issue unless the State affords petitioner either a hearing on the issue of the voluntariness of his confession, or a new trial (TR 75).

A certificate of probable cause to appeal was granted and notice of appeal filed on February 20, 1968 (TR 81-82).

C. Commutation proceedings:

Governor Edmund G. Brown commuted petitioner's sentence of death to life imprisonment with the possibility of parole (TR 13, 46).

ARGUMENT

I.

THE UNITED STATES DISTRICT COURT
ERRED IN ORDERING THE CALIFORNIA
COURTS TO HOLD A HEARING ON THE
VOLUNTARINESS OF PETITIONER'S
RECORDED STATEMENTS.

At approximately 2:30 a.m. on the morning of August 3, 1958, appellee murdered his estranged wife by shooting her six times after lying in wait at her home (TR 48-49). Following the shooting he returned to his home where he was arrested by the police at approximately 4:00 a.m. (TR 49).

Following his apprehension petitioner phoned Travers, his friend and insurance agent. In accordance with petitioner's request Travers visited him in jail on the morning of August 5, 1959, and was told of the events surrounding the shooting by petitioner (RT 996-998).^{2/} As he was leaving the jail Travers informed the authorities of this conversation and acceded to their request that they be allowed to record his conversation with petitioner that

2. "RT" refers to the Reporter's Transcript of trial lodged with the District Court.

afternoon. This second conversation resulted in the tape recording which the district court has held was not properly shown to have been voluntary before it was introduced at trial.

Prior to permitting the introduction of this tape recorded conversation the trial judge held a hearing in chambers, listened to the tape recording and heard arguments of counsel respecting its admissibility (RT 938-992; TR 54). In the presence of the jury evidence was taken on the voluntariness of the conversation and the tape recording was subsequently admitted.

At this time California followed the so-called "Massachusetts" procedure for the admission of confessions. The burden rested upon the prosecution to show that the confession was voluntary [People v. Trout, 54 Cal.2d 576, 583, 354 P.2d 231, 235 (1960); People v. Berve, 51 Cal.2d 286, 291, 332 P.2d 97, 99 (1958)]. The defendant was then permitted to offer evidence in contradiction of the prosecution's showing and the trial judge had to exclude the confession if he found it was improperly obtained. If the trial judge initially found that the confession was free and voluntary it was introduced and, if the evidence were in conflict as to the circumstances surrounding the confession [People v. Blevins, 54 Cal.2d 71, 77, 351 P.2d 776, 780 (1960)] the jury had to be instructed that they had the final power of determination on the issue of voluntariness in that they must disregard the confession if they believed that it was not properly obtained. [People v. Baldwin, 42 Cal.2d 858,

866, 270 P.2d 1028, 1033 (1954); People v. Gonzalves, 24 Cal.2d 870, 876; 151 P.2d 251, 254 (1944)].

In reviewing the admission of this statement the California Supreme Court noted: 1) That Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation petitioner had volunteered, without being questioned, substantially the same statements as those on the tape recording; 2) That at no time during the trial did petitioner contradict Travers' testimony or suggest that any of his recorded statements were untrue; 3) And, that although the recorded conversation demonstrated that Travers referred to the insurance policy - a deception similar to that condemned in Leyra v. Denno, 347 U.S. 556 (1954) - he did so only to explain why he was asking questions and not as an inducement for any particular answers. Thus, there was no comparable mental coercion and the deception itself did not render defendant's statements inadmissible since it was not a type reasonably likely to procure an untrue statement. People v. Atchley, supra, 53 Cal.2d at 170-171, 346 P.2d at 769 (1959).

A. Petitioner's statement was voluntary as a matter of law.

As noted in Davis v. North Carolina, 384 U.S. 737, 740 (1966) the non-retroactive effect of Miranda does not affect the duty of trial courts to consider claims that a statement was taken under circumstances which violated the standards of voluntariness as those standards had begun to evolve long before the Supreme Court's decision in



Miranda and Escobedo. Although there are numerous circumstances to be considered in deciding a claim of involuntariness the test remains: "Is the confession a product of an essentially free and unconstrained choice by its maker?" Culombe v. Connecticut, 367 U.S. 568, 602 (1961). For the following reasons appellant submits that in this case the answer is "Yes" as a matter of law.

The only reference contained in the district court's "Memorandum of Decision" to the initial conversation between petitioner and Travers is:

"Travers testified that he had visited the jail on the morning of August 5th and conversed with Atchley at Atchley's request. After that conversation, Travers admitted that he was asked by the under sheriff to engage Atchley in a second conversation which would be recorded and that he complied with the request. Travers further testified that he offered no threat, promise or inducement to Atchley." (TR 69).

Although this summary of the first and second conversations is correct appellant submits that its brevity overlooks its importance. We have consistently contended that the tape recorded conversation, being substantially the same as the initial conversation, is voluntary as a matter of law.

Travers testified that on the evening of August 4, petitioner requested that he visit him in order to talk about the insurance policy and replenish his supply of cigarettes (RT 997, 999). Of this initial conversation



Travers said:

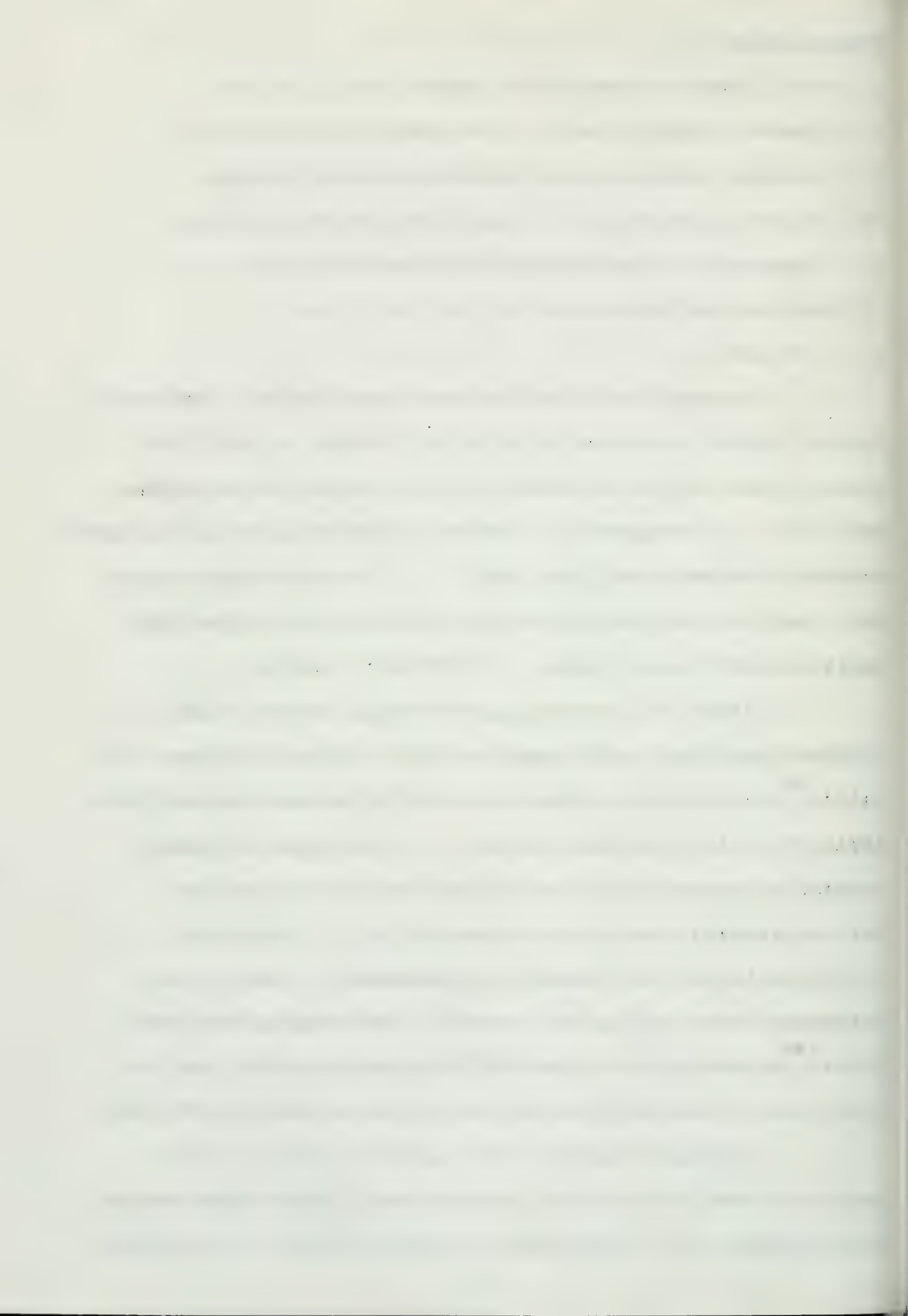
"Mr. Atchley brought the subject up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time."

(RT 1008).

Travers testified on cross-examination, that prior to his initial conversation with petitioner he was never asked by the police to interrogate him about the shooting (RT 1007). In response to further questioning by petitioner's attorney Travers testified that ". . . the first and second conversations was just about the same except I asked more questions the second time. . ." (RT 1008, 1013).

After the morning conversation Travers told Officer Spann what petitioner had told him and informed him that he had to return later in order to secure further information for his insurance company. In response to Spann's request he agreed to allow the officers to record his next conversation with petitioner (RT 997). He did not offer petitioner any threat or inducement to secure the statements made during the recorded conversation and petitioner acknowledged to him that he understood what he said would have to be reported to the insurance company (RT 998).

Appellant submits that upon the state of this record it must be held that petitioner's first conversation with Travers was voluntary as a matter of law. No prejudice



could have occurred in the admission of the tape recording since it contained substantially the same statements Travers could have testified petitioner made during their first conversation. Therefore, the district court erred in not holding the statement voluntary as a matter of law and in ordering a hearing in the state court on the issue of voluntariness.

B. The California courts have previously conducted a full and fair hearing on this issue and the district court erred in holding that the presumptive validity of their determination has been refuted.

The district court ". . . is of the opinion that petitioner has successfully rebutted the presumption contained in 28 U.S.C. § 2254(d), . . ." (TR 75 note 8). The only support in the record for this finding is petitioner's supplemental traverse which states:

"Analysis of this statute [28 U.S.C. 2254(d)] shows however, that the State's position is untenable.

"It provides that such a presumption exists only if the petitioner fails to show that, among other exceptions, the material facts were not adequately developed at the state court hearing or that the state court determination is not supported by the record. It is respectfully submitted that each of these exceptions have been met, and that, consequently, no presumption exists." (TR 65).

Thus, the district court held that the trial court's failure

to receive evidence on five^{3/} issues resulted in: (1) an inadequate development of the material facts [section 2254(d)(3)] which; (2) rendered the finding of voluntariness devoid of support on this record [section 2254(d)(8)] and thus rebutted the presumption of validity established by section 2254(d). Since all of these deficiencies pertain to the voluntariness of the second conversation we submit, for the reasons stated above, that they are irrelevant.

In reaching this result the district court has erroneously concluded that certain applications of the test of voluntariness [Whether an examination of "the totality of the circumstances" shows that the defendant was deprived of "a free choice to admit, to deny, or to refuse to answer." Lisenba v. California, 314 U.S. 219, 241 (1941).] by the United States Supreme Court after petitioner's trial^{4/} were an announcement of new law in the field of voluntariness. The district court then concluded from this premise that

3. The five issues, discussed individually infra are:

- i) Evidence that petitioner had communicated with police his desire to have an attorney;
- ii) Evidence that Travers feigned sympathy for his friend and deceived him about his motives in questioning him;
- iii) Evidence as to whether petitioner knew the statements were being tape recorded;
- iv) The testimony of Officer Spann as to what he said to Travers before the tape recorded statements were elicited, and
- v) Evidence relating to petitioner's mental condition, his ability to read and write and the extent of his education. (TR 71-72).

4. Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961); Gallegos v. Colorado, 370 U.S. 49 (1962); and Davis v. North Carolina, 384 U.S. 737 (1966).

because of the retroactive application of Jackson v. Denno, 378 U.S. 368 (1964), an evidentiary hearing is required to determine whether the application of the test of voluntariness as subsequently enunciated by the United States Supreme Court [see footnote 4] would lead to a different result in petitioner's case. In those cases which concern the district court the United States Supreme Court did not announce any new circumstances to be considered in determining voluntariness.^{5/} The holdings of the United States Supreme Court which the district court feels compel an evidentiary hearing were not only implicit in earlier United States Supreme Court cases but were the law in California at the time of petitioner's trial.^{6/} Appellant submits that the test of voluntariness was not changed by these cases and, the United States Supreme Court does not envision nor require, re-litigation of this issue everytime its application of the test results in a reversal.

The district court, noting that the trial court failed to consider evidence that petitioner was attempting to get an attorney at the time he talked to Travers, cites

5. See Chambers v. Florida, 309 U.S. 227 (1939); Ashcraft v. Tennessee, 322 U.S. 143 (1943); Lisenba v. California, 314 U.S. 219 (1941); Turner v. Pennsylvania, 338 U.S. 62 (1949); Johnson v. Pennsylvania, 340 U.S. 881 (1950); and Fikes v. Alabama, 352 U.S. 191 (1955).

6. See In re Wallace, 24 Cal.2d 933, 937, 152 P.2d 1, 3 (1944); People v. Strobble, 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 (1951); People v. Millum, 42 Cal.2d 524, 526-528, 267 P.2d 1039, 1040 (1954); People v. Berve, 51 Cal.2d 286, 292, 332 P.2d 97, 100 (1958); and People v. Speaks, 156 Cal.App.2d 25, 36-37, 39, 319 P.2d 709, 716-719 (1957).

Reck v. Pate, 467 U.S. 443 (1961) and Columbe v. Connecticut, 367 U.S. 568 (1961), to support its holding that material facts were not developed and thus the record does not support the finding of voluntariness. As stated above, we submit that neither of those cases established any new law in the field of voluntariness, they merely reviewed "the totality of the circumstances" present in each case, and concluded that a condition to be considered in passing on voluntariness was failure to receive counsel after request. California courts had earlier reached this same conclusion in People v. Stroble, 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 (1951). Thus, we concur with both the district court's, and the California Supreme Court's holding that the trial court erred in excluding evidence on the issue of petitioner's request for counsel. However, as noted by the California Supreme Court petitioner has failed to show that this was prejudicial:

"Although a refusal to permit defendant to talk to counsel suggests an attempt to coerce, it seems highly improbable that the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred." People v. Atchley, supra, 53 Cal.2d at 171; 346 P.2d at 770.

In discussing the district court's second allegation of improperly excluded evidence - that bearing on the application of Leyra v. Denno, 347 U.S. 556 (1954) through Travers' feigned sympathy for his friend - the California

Supreme Court noted:

"In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with considerable knowledge of hypnosis.

. . . Although there was a similar deception in the present case, there was no comparable mental coercion.

The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement." People v.

Atchley, supra.

In further support of its holding that failure to hear testimony on this point requires the issuance of the writ the district court cited Spanno v. New York, 360 U.S. 315 (1959). There, a police officer friend of the defendant's was instructed to tell the defendant that because he had called on him his job was in jeopardy. Of course, Spanno had also been questioned throughout the night and the ultimate finding of the Supreme Court was that his will had been overborne by official pressure, fatigue and sympathy falsely aroused. Appellant submits that no similar finding can be made in this case.

The district court next assigns as error the trial court's failure to take evidence relating to whether petitioner knew the conversation was being recorded. Appellant submits, that such evidence would be immaterial. It is well established "that a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room," Lanza

v. New York, 370 U.S. 139, 143 (1961); that inmates of prisons do not have the usual array of federal and state constitutional rights guaranteed to non-incarcerated citizens, Price v. Johnson, 334 U.S. 266, 285 (1947); and that prison authorities may subject inmates to an intense surveillance and search unimpeded by Fourth Amendment barriers. Lanza v. New York, supra. In People v. Morgan, 197 Cal.App.2d 90, 92-94, 16 Cal. Rptr. 838, 840 (1961); cert. denied, 370 U.S. 965 (1962), it was held that an electronic recording of a conversation between a county jail prisoner and his sister was not an illegal search and seizure nor an unlawful invasion of the prisoner's privacy. The court remarked:

"A man detained in jail cannot reasonably expect to enjoy the privacy afforded to a person in free society. His lack of privacy is a necessary adjunct to his imprisonment."

As a fourth assignment of error the district court cites the trial court's limitation of the proposed cross-examination of Officer Spann to those matters covered in direct examination. California and a majority of states follow the federal rule restricting cross-examination to the scope of the direct examination in contrast to the "wide open" rule followed in England and a few American states which allow cross-examination on any matter relevant to the issues of the case regardless of whether it was raised during direct examination. Thus, we submit that not only did the trial court properly limit the scope of the proposed examination of Officer Spann but furthermore,

no prejudice can be shown since the defense attorney knew he could call any of the People's witnesses as his own and examine them on any matters he wished (RT 932).

The fifth assignment of error is the trial court's failure to obtain evidence relating to petitioner's mental condition, whether he was able to read or write and the extent of his education.

It should be noted here that although the issue of voluntariness was presented at trial, on direct appeal, certiorari, and is the sole grounds for the district court's order from which we have appealed, the admission of this tape recording was opposed at trial primarily on the grounds of privileged communication (RT 942-945).

Appellant contends that the burden of introducing evidence on a defendant's mental condition, his literacy and the extent of his education, rests upon him if he intends to seriously challenge his statement as being involuntary. It is clear from the record (TR 72 note 4) that considerable evidence on these issues was eventually presented at trial by the petitioner. Thus, the failure to elicit this type of testimony on voir dire prior to the introduction of the tape should not now be charged against the prosecution.

II.

THE ORDER APPEALED FROM ERRONEOUSLY
DIRECTS THE CALIFORNIA COURTS TO
ACT IN EXCESS OF THEIR JURISDICTION.

If we do not prevail upon the arguments above we respectfully request that this Court modify the following language of the district court's order:



"Accordingly, the writ of habeas corpus is granted unless the State, within a reasonable time, affords Atchley either a hearing on the issue of voluntariness which is consistent with the requirements of due process or a new trial, failing which Atchley is entitled to his release." (TR 75).

Petitioner's judgment of conviction has long since become final in the California Courts. Hence, there is no state court which presently possesses jurisdiction over this cause to hold a hearing on the issue of voluntariness as envisioned by the district court's order. The necessary jurisdiction can be conferred on a California court pursuant to its habeas corpus jurisdiction (Calif. Const., art. VI, § 10) however, in order to invest such jurisdiction an application must be made by petition signed either by the party seeking relief or some person in his behalf (Calif. Pen. Code § 1474).

Appellant respectfully submits that the district court has ordered the state courts to either conduct a hearing, which they are without jurisdiction to hold unless petitioner takes the affirmative act of filing a petition, or release him. Wherefore, we respectfully request that the order of the district court be modified to direct petitioner to file a petition for habeas corpus in the California Supreme Court in order to invest the state courts with the necessary jurisdiction to comply with the order of the district court.




CONCLUSION

We respectfully submit that this Court should reverse the order of the District Court on the grounds that the statement made by petitioner to Travers was voluntary as a matter of law or, that a full and fair hearing at which the material facts on the issue were adequately developed was held in the state court and pursuant to Title 28 U.S.C., section 2254(d), the holding of the state court being presumptively valid should be upheld.

DATED: June 18, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General


WILLIAM D. STEIN
Deputy Attorney General

Attorneys for Appellant

WDS:lp
24SFCR 67-360

The first of the year was a very successful one for the
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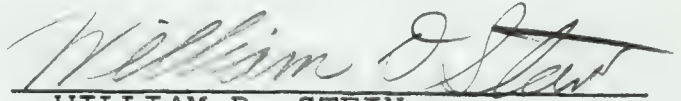
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: June 18, 1968


WILLIAM D. STEIN
Deputy Attorney General



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,
Respondent-Appellant,
vs.
VERON ATCHLEY,
Petitioner-Appellee.

FEB 21 1968

No. 22735

APPELLANT'S CLOSING BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

WILLIAM D. STEIN
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone 557-2847

Attorneys for Appellant

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ARGUMENT

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ERRED IN ORDERING THE CALIFORNIA
COURTS TO HOLD A HEARING ON THE
VOLUNTARINESS OF PETITIONER'S
RECORDED STATEMENT. 1
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APPELLANT'S CLOSING BRIEF

ARGUMENT

I.

THE UNITED STATES DISTRICT COURT ERRED
IN ORDERING THE CALIFORNIA COURTS TO
HOLD A HEARING ON THE VOLUNTARINESS OF
PETITIONER'S RECORDED STATEMENT.

A. Appellee's confession was voluntary as a matter of law.

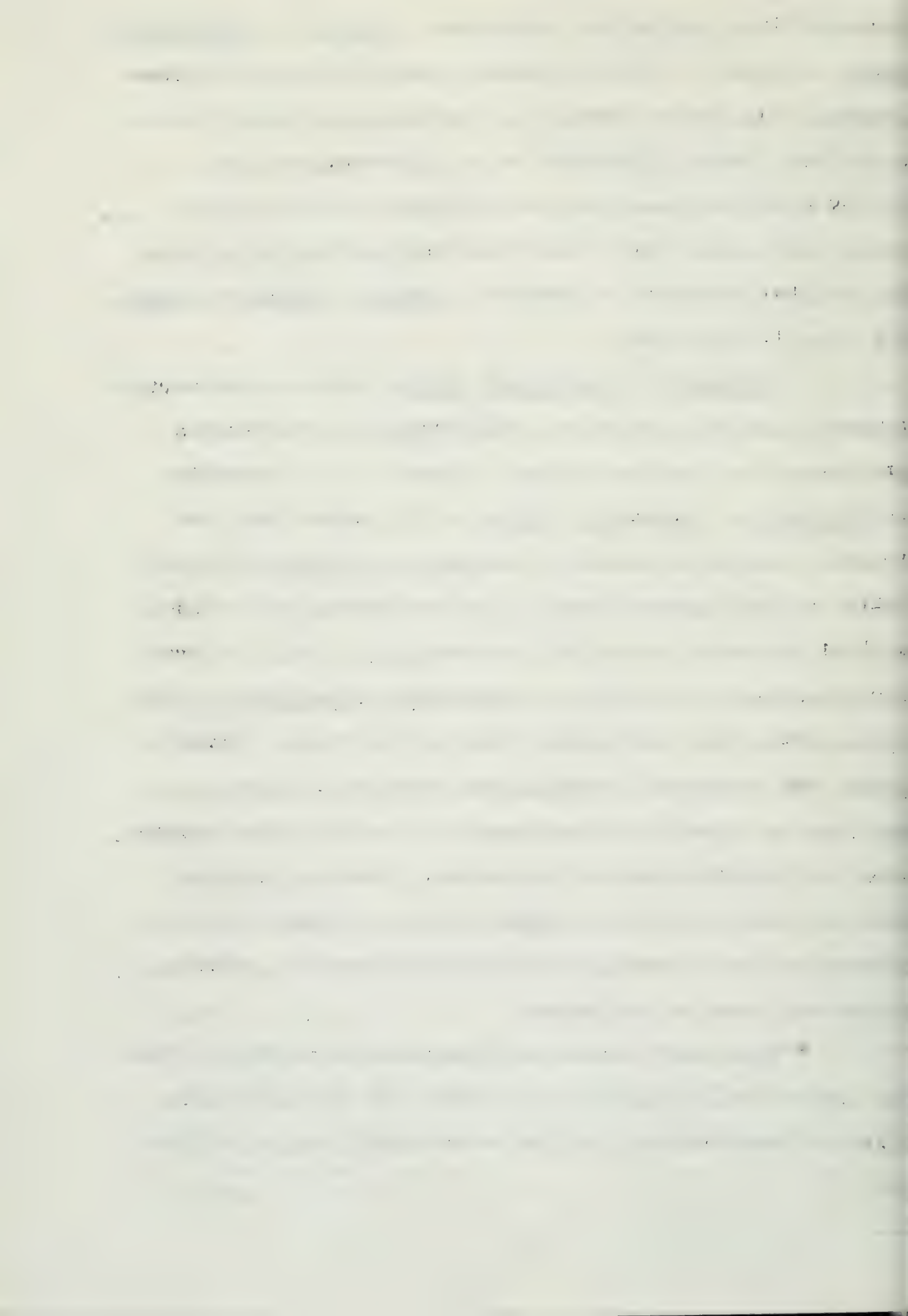
Appellee, relying upon Darwin v. Connecticut, ____
U.S. ____; 20 L.Ed. 2d 630 (1968) and Greenwald v. Wisconsin,
____ U.S. ____, 20 L.Ed.2d 77 (1968), urges this Court to
hold his statement involuntary as a matter of law.

In Darwin v. Connecticut, supra, the trial court
excluded Darwin's first two confessions as involuntary but
admitted his third confession. The United States Supreme
Court noting that "the officers kept petitioner incommunicado
for thirty to forty-eight hours during which they sought and
finally obtained his confession" without a break in the
stream of events sufficient to insulate the third confession
from the two concededly involuntary confessions which

preceded it set aside his conviction. Darwin v. Connecticut,
supra, at 633-634. In the instant case Atchley was allowed
to summon his friend Travers to the jail and receive him as
a visitor. Hence, there can be no inference that the
police sought to keep appellee incommunicado in order to
obtain his confession or that they had anything to do with
his initial statement to Travers. Compare, Malloy v. Hogan,
378 U.S. 1, 7-8 (1964).

Greenwald v. Wisconsin, supra, does not support an
argument that this Court can find appellee's confession
involuntary as a matter of law. Stewart, J., dissenting
in Greenwald v. Wisconsin, supra, at 80, noted that the
voluntariness of Greenwald's confession was raised by the
United States Supreme Court on its own motion and decided
without Wisconsin having any opportunity to brief or argue
the question on its merits. Furthermore, Greenwald is dis-
tinguishable from the instant case on its facts. Prior to
giving any statement Greenwald was deprived of food,
medicine and sleep, then subjected to two and three-quarter
hours of interrogation by the police. Travers, to whom
appellee spontaneously gave his initial statement, was
allowed to visit Atchley at the latter's request, within
thirty-six hours of his arrest.

This Court should not, as appellee suggests, find
his confession involuntary as a matter of law because the
District Court did not hold an evidentiary hearing on this

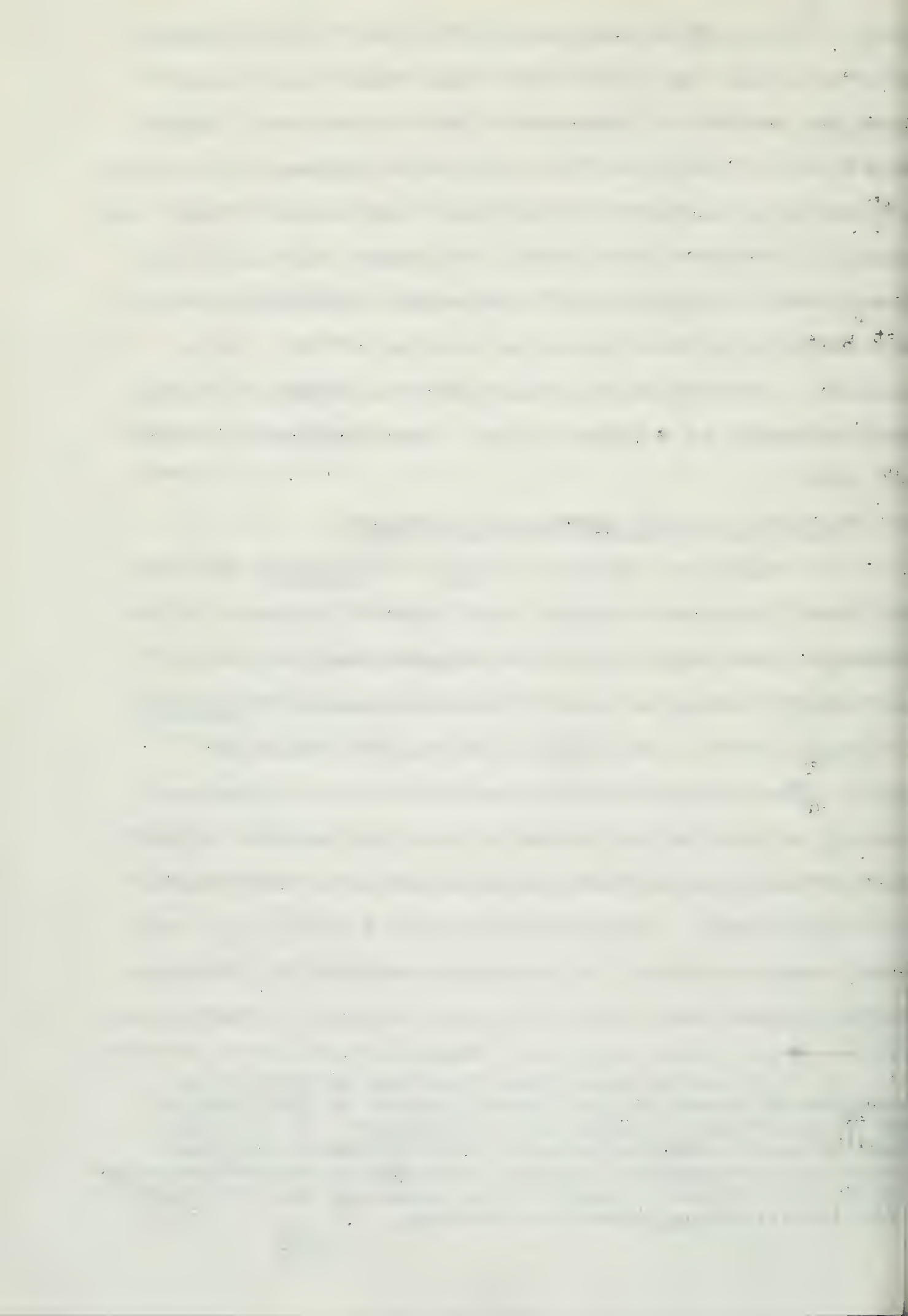


^{1/}
issue. The only evidentiary hearing ever held to resolve this issue was that held by the state trial court which appellee attacks as inadequate. The District Court determined that it could not find appellee's statement involuntary without an evidentiary hearing which they decreed should take place in the state trial court. We submit that this Court should not, on the basis of this record, find appellee's statements to be involuntary as a matter of law. We do, however, contend that this Court can find appellee's statement voluntary as a matter of law. See Appellant's Brief, pp. 3-14.

B. The trial court's hearing was adequate.

Appellee, relying on Boles v. Stevenson, 379 U.S. 43 (1964), contends that the trial court's admission of his statement over objection to its voluntariness was not a sufficient finding to satisfy the requirements of Jackson v. Denno, 378 U.S. 368 (1964). At the time Boles was tried, West Virginia practice required that a preliminary hearing be held in the absence of the jury whenever a statement offered into evidence was objected to on the grounds of voluntariness. Without holding such a hearing the trial court overruled Boles' objection and admitted his statement. In the instant case, the trial court retired to chambers and

1. It must be noted that there has never been an evidentiary hearing in the Federal Courts on the issue of the voluntariness of appellee's statements. It is important to recall that the order of the District Court from which we have appealed followed a hearing on our return to the District Court's order to show cause and did not result from a factfinding evidentiary hearing.



heard the evidence it considered relevant to determining voluntariness prior to admitting the statement.^{2/} We submit that the question of the voluntariness of appellee's statement was clearly resolved when the trial court, "duty bound to withhold . . . [the statement] from the jury's consideration" if found to be involuntary [People v. Gonzales, 24 Cal.2d 870, 876 151 P.2d 251, 254 (1944)], allowed the statement to go to the jury over an objection to its voluntariness.

Appellee complains that most of the evidence he sought to present on the issue of voluntariness at the hearing held in chambers was eventually heard by the jury who were not instructed on the issue of voluntariness. He contends that the hearing on the issue of voluntariness was thus held in the presence of the jury and this violates the rule established by United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968); Johnson v. United States, 390 F.2d 517 (9th Cir. 1968); and Turner v. United States, 387 F.2d 333 (5th Cir. 1968).

United States v. Nielsen, supra, involved a situation where the jury heard evidence that the defendant, upon

2. We submit that upon the state of this record it cannot be contended that the trial court did not hold a hearing on the issue of voluntariness. It can, as appellee does, be argued that the trial court erred in refusing to hear evidence which appellee considered properly presented on the issue of voluntariness. However, from the record presented on voir dire the trial court found, regardless of the extent of the evidence on the issues Atchely sought to develop, that upon examination of "the totality of the circumstances" it could not be said that he had been denied "a free choice to admit, to deny, or to refuse to answer" and thus his statement was admissible. See, Lisenbo v. California, 314 U.S. 219, 241 (1941); and Appellant's Brief, pp. 9-14.

being questioned by the F.B.I., had availed himself of his constitutional right to remain silent. The Seventh Circuit held it was reversible error to allow the jury to hear this inadmissible evidence because from it they might have inferred defendant's guilt. Of course, Atchley's statement has never been held to be inadmissible and thus we submit Nielsen is not analogous. In Johnson v. United States, supra, no hearing on the issue of voluntariness was ever held and we submit it cannot be authority for overruling, Pinto v. Pierce, ___ U.S. ___ 19 L.Ed.2d 31 (1967). Johnson holds that in this Circuit the District Courts must follow the preferred procedure by holding hearings on voluntariness apart from the jury. This does not however, create a constitutional standard. Finally, Turner v. United States, supra, holds that the District Court committed a procedural error in failing to hold the hearing on voluntariness outside the presence of the jury. Reversible error occurred because the trial court failed to allow the defendant an opportunity to testify on voir dire. In the instant case, appellee had an opportunity to testify on voir dire outside the presence of the jury.

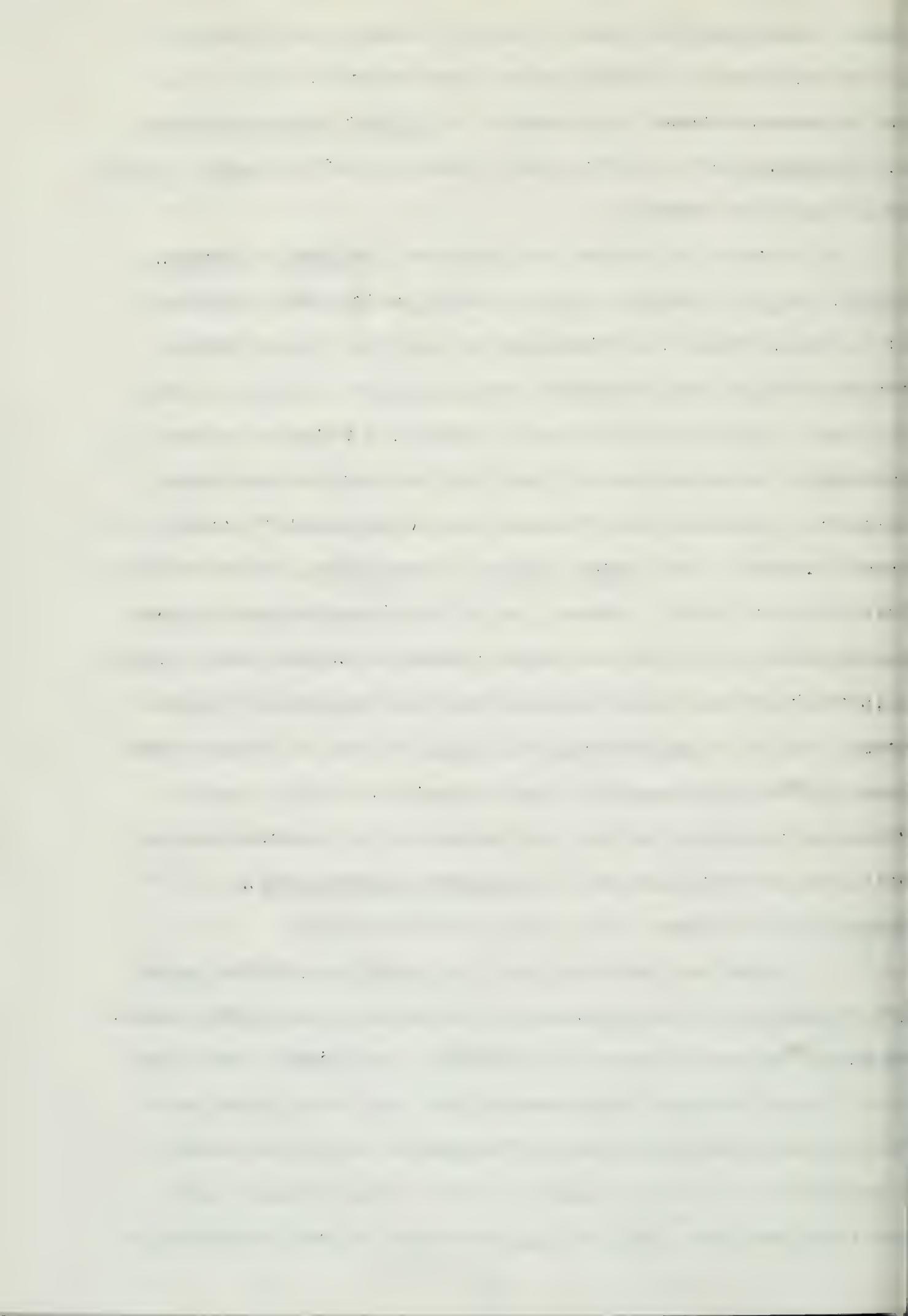
We submit that United States v. Nielsen, supra; Johnson v. United States, supra, and Turner v. United States, supra, do not overrule Pinto v. Pierce, ___ U.S. ___ 19 L.Ed.2d 31 (1967), and if the hearing on voluntariness was held in the presence of the jury it would not be constitutional error. Of course, it is better procedure to hold such a hearing in the absence of the jury since the



trial court runs the risk of having to declare a mistrial if the statement is found to be involuntary. But, it is not a constitutional requirement. Compare, United States v. Feinberg, 383 F.2d 60, 69-70 (2nd Cir. 1967), cert. denied, 19 L.Ed.2d 836 (1968).

Absent a request by appellee, Jackson v. Denno, supra, does not compel a trial court to resubmit the issue of voluntariness of a statement to the jury after having concluded that the statement was voluntary. Indeed, a requirement that this issue must, without a request by the defendant, be submitted to the jury as well as the judge would be a serious interference with a defendant's choice of trial tactics. See United States v. Anderson, 394 F.2d 743, 747 (2nd Cir. 1968). Where, as in the instant case, there was no conflict in the evidence presented to the trial court as to the circumstances surrounding the defendant's statements [the only issue being the legal effect of those events upon the voluntariness of the statements], there was no evidence presented to the jury requiring an instruction on the issue of voluntariness. Compare Commonwealth v. Howard, 212 Pa.Super. 100; 239 A.2d 829 (1968).

Appellee contends that at a hearing on the issue of voluntariness the prosecution is required to prove voluntariness "beyond a reasonable doubt." We submit that there is no constitutional requirement that the trial court must find the confession voluntary "beyond a reasonable doubt." A confession is not an element of the crime charged and, the trier of fact need only be persuaded of the defendant's



guilt "beyond a reasonable doubt." Voluntariness of a statement is a question of fact which need only be resolved "by a preponderance of the evidence." If, after resolving all questions of fact "by a preponderance of the evidence" the trier of fact is persuaded "beyond a reasonable doubt" of the guilt of the accused then he may be properly convicted. Compare, United States v. LaVallee, 282 F.Supp. 718, 721 (S.D. N.Y. 1968); and Commonwealth v. Rundle, 429 Pa. 141; 239 A.2d 426 (1968).

In summary, we contend that the District Court improperly concluded that a hearing was required in order to determine the voluntariness of appellee's statements because, at the time of appellee's trial, California followed the so-called "Massachusetts Rule" and therefore, the admission of appellee's statement over an objections to its voluntariness is a sufficient finding to satisfy Jackson v. Denno, supra. Compare, People v. Berve, 51 Cal.2d 286, 332 P.2d 97 (1958); People v. Trout, 54 Cal.2d 576; 354 P.2d 231 (1960). Furthermore, even if the trial court did not hold a proper hearing, the California Supreme Court after a full and fair hearing on this issue resolved the matter adversely to appellee [see People v. Atchley, 53 Cal.2d 160; 346 P.2d 764 (1959)] and that determination should be upheld. 28 U.S.C. § 2254(d).



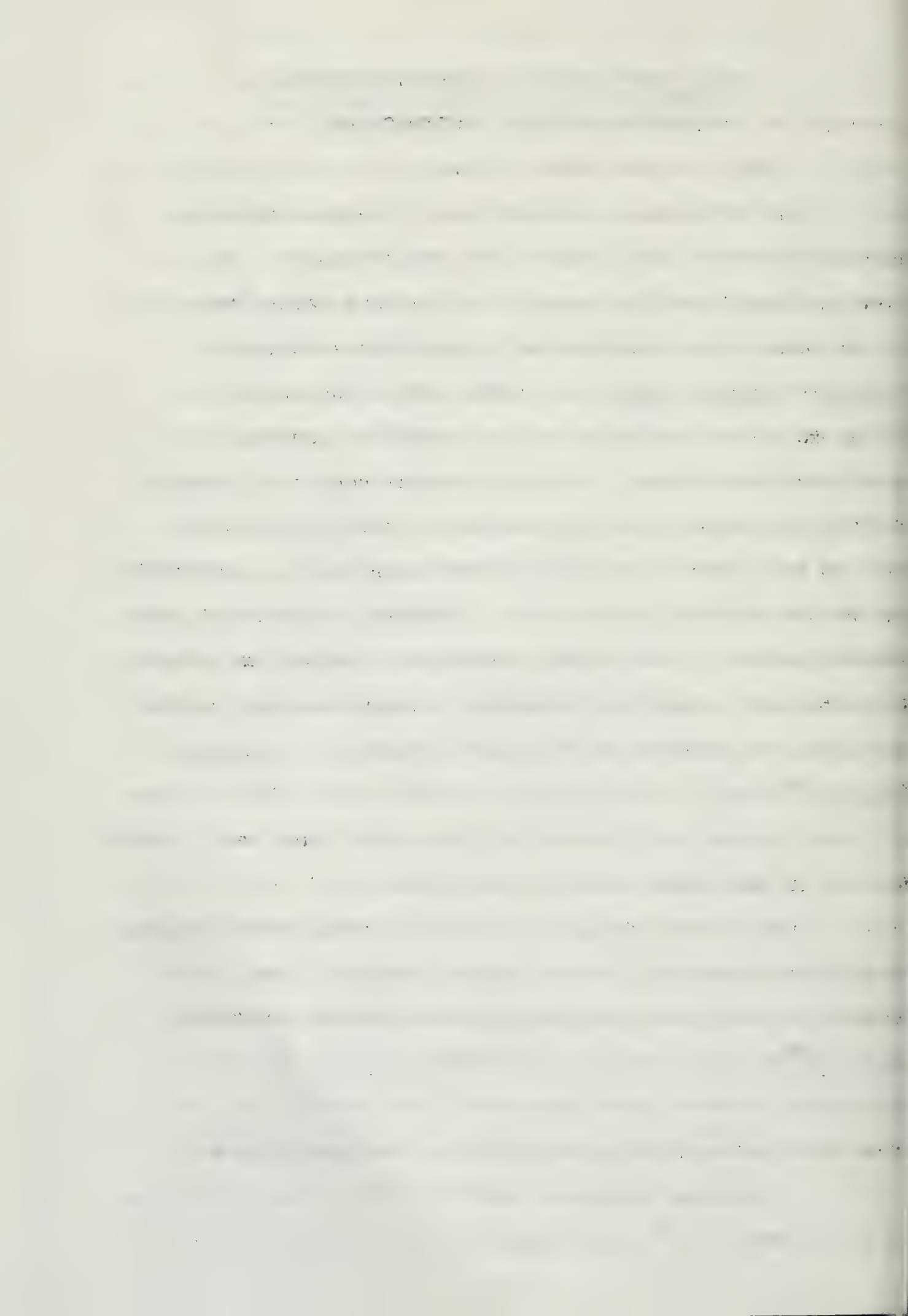
II.

THE ORDER APPEALED FROM ERRONEOUSLY
DIRECTS THE CALIFORNIA COURTS TO ACT
IN EXCESS OF THEIR JURISDICTION.

The District Court has ordered the state courts to hold a hearing on the voluntariness of these statements. Appellee contends that this is the proper remedy. The District Court has the power to hold this hearing itself or it can employ the procedure of convenience outlined in Jackson v. Denno, supra, and order the state courts to either hold the hearing or suffer complete reversal of appellee's conviction. We are in accord with the District Court's conclusion that the hearing on this issue, if it must be held, should be held in the state courts, preferably before the original trial court. However, there is no procedural scheme in California whereby the People can properly initiate such a hearing. Granted, it has been done in the past, but not without conflict and litigation. Compare, Williams v. Beto, 386 F.2d 16, 17-19 (5th Cir. 1967); where Williams claimed the findings of the state court were invalid because it had acted without jurisdiction.

We do not intend to indicate a total unwillingness to hold this hearing. We do request however, that jurisdiction be conferred upon the state courts by directing appellee to file a petition for habeas corpus with the California Supreme Court thereafter, the hearing may be held within the existing California procedural framework.

Appellee complains that this will place the burden of proof upon him. We submit that the procedure adopted in



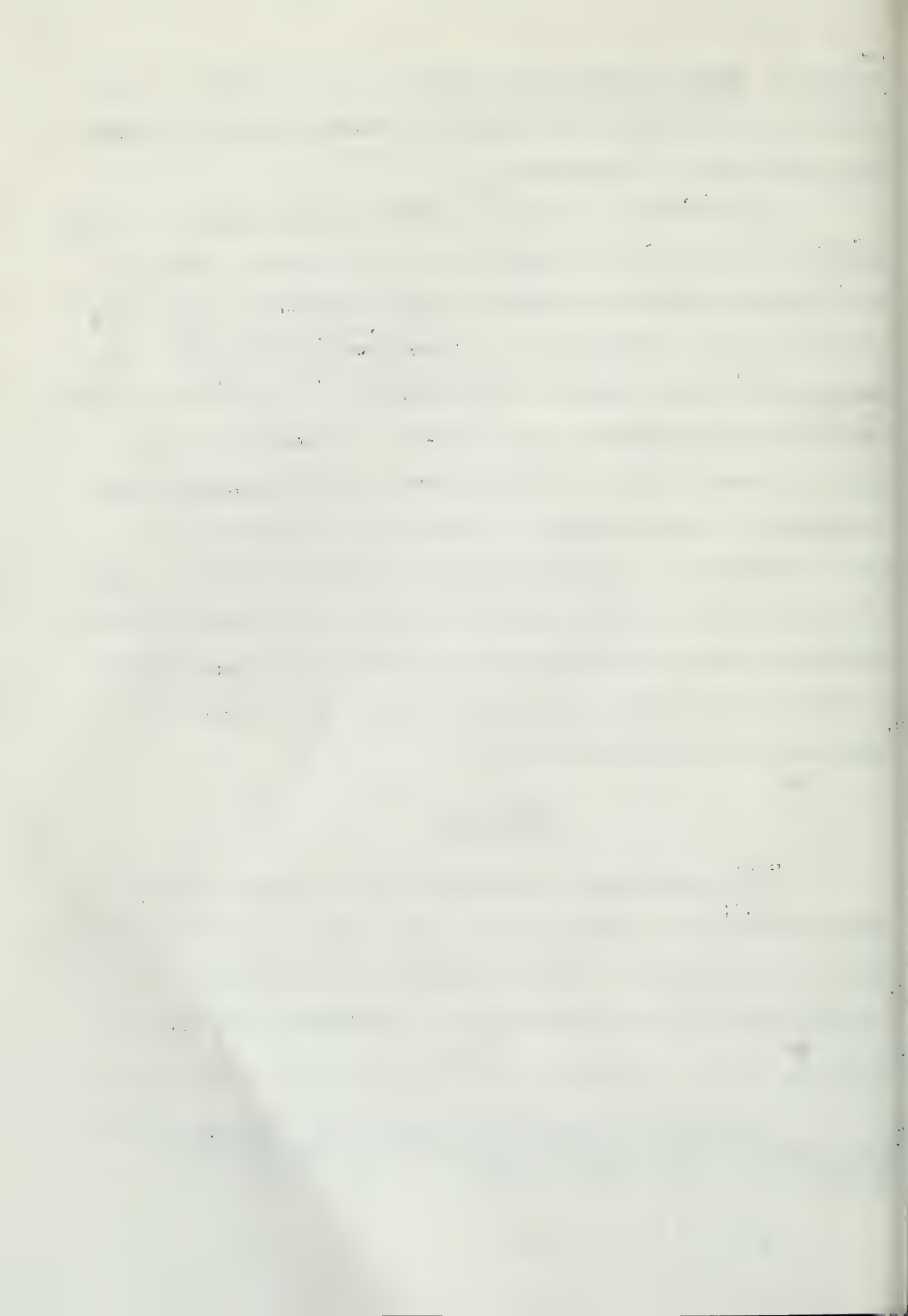
Jackson v. Denno, supra, for compelling state courts to hold hearings on voluntariness does not shift the burden of proof from petitioner to respondent.

Furthermore, we do not conceive this to be an onerous burden in this case. As noted above, the instant case does not concern disputed questions of fact but rather their legal effect upon the voluntariness of appellee's statements. The District Court has decided that a hearing on appellee's allegations of involuntariness must be held. It had also determined to avail itself of the procedural convenience outlined in Jackson v. Denno, supra, to compel the state courts to hold the hearing. Regardless of whether this hearing is held in the federal or state courts it remains an evidentiary hearing whose purpose is to resolve an issue raised by appellee on collateral attack. As such the burden of proof remains on appellee, the petitioner herein.

CONCLUSION

We submit that since appellee initiated the first conversation with a friend whom he had summoned to his jail cell, the two factors for consideration on the issue of voluntariness ^{3/} have no bearing on the instant case and the

3. Protection from secret inquisition, and protection from compulsion to self-incriminate. See Gallegos v. Colorado, 370 U.S. 49, 55 (1962).



order appealed from should be reversed.

DATED: November 14, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

WILLIAM D. STEIN
Deputy Attorney General

Attorneys for Appellant

WDS:lp
24 SFCR
67-360



No. 22742

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DISTRICT COUNSEL OF PAINTERS NO. 16 OF
ALAMEDA, MARIN, CONTRA COSTA, NAPA,
SOLANO, YOLO, PLACER, SACRAMENTO, NE-
VADA, EL DORADO AND SIERRA COUNTIES,
Appellants,

VS.

PAINTERS UNION LOCAL 127, PAINTERS
UNION LOCAL 560, PAINTERS UNION LO-
CAL 1178, SAM CAPONIO, WALLACE ROOD,
DALE BALL, JAMES L. BROWN, TED CARTY,
LEE LOPEZ AND MORRIS KOMIE,
Appellees.

APPELLANTS' OPENING BRIEF

SMITH, PARRISH, PADUCK & CLANCY
PAUL PADUCK
PHILLIP J. SMITH

315 Financial Center Building
Oakland, California 94612

Attorneys for Appellants

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Appellees.

APPELLANTS' OPENING BRIEF

JURISDICTION

These actions, which were consolidated for purposes of trial and this appeal, were brought by three (3) local unions and seven (7) individuals who were members of said local unions against Appellants who are the District Counsel of Painters No. 16, which is composed of the Appellee local unions and other local unions, and the officers of the District Counsel.

The complaints sought to enjoin the Appellants from taking any action to collect increased dues imposed by the Appellant, District Counsel in 1966. Thereafter, the lower Court held that the Appellants' action regarding the dues increase in 1966 did not comply with 28 USC 411(a) (3) and for that reason was unlawful. The lower Court entered its judgment and decree enjoining the Appellants from taking any action to collect or discipline any plaintiff for failure to pay the increased dues imposed in the 1966 action of the Appellants on February 2, 1968.

The jurisdiction of this Court to review the judgment rests on 28 USC 1291. The jurisdiction of the District Court rests on 29 USC 411 and 412.

STATEMENT OF THE CASE

The Appellees are three (3) local house painter unions of some eight (8) local house painter unions who together with five (5) autonomous painter unions are affiliated with the Appellant (R-32). The appellant is affiliated with and operates under the charter from the Brotherhood of Painters, Decorators and Paper Hangers of America AFL-CIO and has a territorial jurisdiction which covers the counties of Alameda, Marin, Contra Costa, Napa, Solano, Yolo, Placer, Sacramento, Nevada, El Dorado and Sierra in the State of California (R-31).

Article VI section 6(d) of the Appellants By-Laws, enacted in 1956, provided as follows:

“(d) The regular monthly dues for journeymen house painters, beneficial members, shall be increased in addition to the amount now being paid by the sum of money equal to the raise negotiated for one day (7 hours) and such additional payment of dues shall commence with the next effective annual date of the contract and continue for each succeeding twelve month period. Such increase would be leveled off at the nearest 25¢ divisible period. As a result of any dues increase to become effective, 50 % shall go to the LU and 50 % shall go to the DC as increased special per capita tax.” (R-33)

Since 1962, Article VI, section 6(d) of said By-Laws have provided as follows:

“(d) The regular monthly dues for journeymen house painters, beneficial members, shall be increased in addition to the amount now being paid by the sum of money equal to the raise negotiated for one day (7 hours) and such additional payment of dues shall commence with the next effective annual date of the contract and continue for each succeeding twelve month period. Such increase would be leveled off at the nearest 25¢ divisible period. As a result of any dues increase the delegates to the District Council shall determine by vote what proportion will remain in the Local Union and what proportion will go to the District Council. In the event the delegates of the District Council deem it feasible to the best interests of the

District Council, the Local Unions and the Membership, the delegates may at any regular meeting declare a waiver on all or part of a dues raise by a majority vote." (R-33)

Although the hourly wage of journeyman painters (pursuant to the terms of Collective Bargaining Agreements periodically negotiated with employers in the territory covered by Appellant) increased each year since 1957 the actual dues imposed upon members were increased but four different times including the raise in 1966 which is the subject of the within action. (R-44)

Effective as of July 1, 1965, pursuant to the terms of the Collective Bargaining Agreement negotiated at or about that time with employers in the Northern California Area, a wage increase equivalent to fifty cents per hour was negotiated. (R-34)

Applying the formula as set forth in the By-Laws section described above, the Appellant had the authority to increase journeyman dues by three dollars fifty cents per month. However, the delegates to the Appellant increased the dues by one dollar seventy-five cents per month per member in 1966 (R-34) out of which each local union was required to pay to the District Council the sum of ninety cents per month per member (R-34) thus increasing the per capita tax from three dollars twenty-five cents per month to four dollars fifteen cents per month per member.

SUMMARY OF ARGUMENT

29 USC 411(a) (3) provides as follows:

“ . . . (3) *Dues, initiation fees, and assessments.*— Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except. . . .

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organizations.”

The just referred to code section clearly contemplates that for any increase in the *rates* of dues, subsequent to its enactment in 1959, to be valid, certain procedural steps must be followed. The statute is equally clear that absent an increase in the *rates* of dues after 1959 the failure to follow certain procedural steps is of no moment.

The Appellant herein maintains that its rate of dues was established sometime prior to 1959, and for that reason, when the amount of dues was increased in 1966, it was not required to employ any of the methods set forth in Section 411 (a) (3).

ARGUMENT

I.

THE RATES OF DUES HAVE NOT BEEN INCREASED.

The record in this matter is clear that the formula which established the rate of dues for house painter local union members affiliated with the Appellant was established prior to 1959.

Dues were set at a base amount and the Appellant, through its delegates, was, and is, precluded from increasing the dues in excess of one hundred per cent of the total amount of any increase in wages for one working day per month, subject to the waiver provision which was added in 1962. The rate was set and has been maintained for approximately 10 years prior to the commencement of this action.

The Courts have recognized that rates of dues can be tied to wages and an increase in amount of dues is not necessarily proscribed by the act even though procedural steps are not taken.

See for example *Zentner v. Musicians* 237 Fed Supp. 457 (1965) affirmed 343 F.2d 758 (1965). In *Zentner*, supra, the Plaintiff sought to restrain locals from requiring non-local members to pay to them a percentage of their wages derived from performances within the locals jurisdiction. Both before and after September 14, 1959, the amounts collected by the locals were established pursuant to the Federations By-Laws at a rate not to exceed four (4) per cent.

The Court there stated:

“Finally, there has been no showing by the plaintiff, much less any discussion of facts, that the ‘work dues equivalents’ in the Georgia and Florida locals are ‘rates of increase beyond those as of September 14, 1959, the effective date of the Act. As plaintiff himself points out in his memorandum of law, Article 16, Section 26 of Federation’s by-laws has for many years permitted locals to impose a levy not exceeding four per cent upon traveling members not subject to Federation’s ‘traveling surcharge of ten per cent. It has not been suggested that any levy imposed by the Florida and Georgia locals under Section 26 in effect on September 14, 1959, was less than the rate

of the present 'work dues equivalents' which plaintiff now resists. In such circumstances there has been no increase in the 'rate' upon which a vote would have been required. Indeed, the papers are silent as to whether 'engagement dues' imposed by the Georgia local or the 'work dues equivalents' of the Florida local were enacted under the old Article 16, Section 26 provision or the more recent authority. It is of no consequence that the payments are styled 'work dues equivalents,' 'engagement dues,' 'monies equivalent to dues,' 'work permit fees' or 'tax'."

The Courts attention is directed to *Schwartz vs. Associated Musicians of Greater New York, Local 802*, 340 F.2d. 228 (1964) in which the Court by implication affirmed dues based on a percentage of earnings formula.

See also *Dejov v. Davis* (D.C. N. Ill) 61 LRRM 2203 (1966).

While exhaustive research into the legislative history of Section 411 of the Act has disclosed no reason for the use of the term rate as contrasted with amount, it is submitted that Congress must have been aware and recognized that not only do unions differ with regard to their due's formulas, but also within certain unions rates vary. For example, some unions' dues are at a flat rate, others are a percentage of earnings and others are related to wage increases. Further, it is well recognized that within

a given union there are certain classifications of members who pay a different amount of dues e.g. journeyman and apprentices.

II.

THE TRIAL COURT'S CRITERIA FOR DETERMINING WHETHER THE RATES OF DUES HAS BEEN INCREASED WAS IN ERROR.

The Trial Court, in arriving at its decision, placed a great deal of reliance upon a table prepared by it and its discussion based thereon (R-44-46).

While at first blush it may appear that there is some logic in the Trial Court's reasoning, it is submitted that if taken to its ultimate conclusion no organization could establish a dues structure that the Trial Court would not find fault.

For example, assuming a union with a flat dues structure amounting to \$10.00 per month per member, or \$120.00 per year. Obviously, the income of each member will vary in a given year as will the income of each individual member from year to year. Applying the court's reasoning to this hypothetical, although usual, situation, the percentage of dues as related to income will not only vary with regard to each member in a given year but also with regard to each individual member from year to year.

The Trial Court's reasoning, as it relates solely to the formula in the instant matter, not only dis-

regards the recession in the building industry before, during and after 1966, but would also require that before the Appellant imposes certain dues upon an individual for any given period it wait until the end of that period (a year if the Trial Court's formula is to be employed) so as to determine the number of hours worked.

Finally, it is submitted that the trial court, by implication, would find no fault with the formula used by the Appellant herein if it had, instead of waiving one dollar seventy-five cents, waived two dollars ninety cents, thus increased the amount of dues but by sixty cents.

CONCLUSION

For the reasons stated above, the judgment of the Court below should be reversed.

Dated, Oakland, California, July 1, 1968.

Respectfully submitted,

SMITH, PARRISH, PADUCK & CLANCY
PAUL PADUCK
PHILLIP J. SMITH

Attorneys for Appellants

CERTIFICATE OF COUNSEL

We certify that in connection with the preparation of this brief we have examined rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

PAUL PADUCK

PHILLIP J. SMITH

Attorneys for Appellant



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DISTRICT COUNCIL OF PAINTERS,)
NO. 16, et al.,)

Appellants,)

vs.)

NO. 22742

TED CARTY, et al.,)

Appellees.)

APPELLEES' BRIEF

FRANCIS J. McTERNAN
GARRY, DREYFUS, McTERNAN & BROTSKY
341 Market Street
San Francisco, California 94105

Attorneys for Appellees

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Attorneys for Appellees

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DISTRICT COUNCIL OF PAINTERS,)
NO. 16, et al.,)

Appellants,)

vs.)

TED CARTY, et al.,)

Appellees.)

NO. 2 2 7 4 2

APPELLEES' BRIEF

STATEMENT OF CASE⁽¹⁾

The Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, is an international labor organization, within the meaning of section 3 (i) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 402 (i)).⁽²⁾ (R. 30) The Brotherhood is governed by its International officers and a so-called General Executive Board, which handle the affairs of the Brotherhood between conventions of the International, which are held every five years. (Exh. 1) The Brotherhood has chartered local unions throughout the United States and Canada. Among them are Local 127, of Oakland, California, Local 560, of Richmond, California, Local 1178, of Hayward, California, and

(1) The statement of the case is based primarily upon the Agreed Statement of the parties in the District Court. (R. 30-37)

(2) This Act is generally referred to as the Landrum Griffin Act and will be, at times, so referred to in this brief.

Local 487, of Sacramento California, all but the latter of which are parties plaintiff to this action.

The Brotherhood also charters District Councils. District Councils are composed of local labor organizations, which operate within the territorial jurisdiction of the District Council. Defendant DISTRICT COUNCIL NO. 16, in this case, is chartered by the Brotherhood and has a territorial jurisdiction which covers the Counties of Alameda, Marin, Contra Costa, Napa, Solano, Yolo, Placer, Sacramento, Nevada, El Dorado and Sierra. (R. 31)

Under the Constitution of the Brotherhood (Exh. 1), all local unions within the territorial jurisdiction of the District Council must be affiliated therewith. (R. 32) Thus, Locals 127, 560, 487 and 1178, which are the local unions involved in this litigation, are affiliated with the District Council.

Under the Constitution of the Brotherhood (Exh. 1) and the By-laws of DISTRICT COUNCIL NO. 16 (Exh. 2), a distinction is made between types of local unions affiliated therewith. Thus, local unions consisting of housepainters have a different status with the District Council than local unions consisting of persons engaged in trades other than house-painting. In the parlance of the Brotherhood, the former are referred to as housepainter local unions and the latter are referred to as autonomous local unions. Local 487 and plaintiff locals 127, 560 and 1178 are house-painter local unions. (R. 32)

Each local union affiliated with DISTRICT COUNCIL NO. 16 is entitled to send five delegates to the District Council, regardless of the number of members in the local. (R. 32-33) Thus, a local with 1,000 members has the same representation on the District Council as a local

having 150 members.

The dues payable by members of housepainter locals to the local union are fixed in the By-laws of the District Council. Thus, under the current By-laws (Exh. 2), regular monthly dues payable to the housepainter locals by each of its members were fixed in 1959 at \$8.85 per month. (Exh. 2, Article VI, §6 (a))

Ever since 1956, Article VI, §6 (d) of the By-laws have provided that the regular monthly dues for housepainters would be increased by the sum of money equal to the wage increase negotiated for seven hours' work and that such additional payment of dues would commence on the next effective annual date of the contract following the negotiation of the wage increase. (R. 33) In 1962, an amendment to the By-laws gave the delegates to the District Council authority to determine what portion of the increase would remain with the local union, and what portion would go to the District Council, and to determine whether to waive a part or all of the automatic increase. (R. 33) ⁽³⁾

The Landrum Griffin Act provides that subsequent to its effective date, (September 14, 1959), rates of dues, except in the case of federations of national or international labor organizations, may not be increased except as provided in said Act.

Thus, in the case of local labor organizations, dues increases can be accomplished only by "(i) a majority vote by secret ballot of the members in good standing voting at a general or special membership meeting after reasonable notice of the intention to vote upon such questions, or (ii) by majority vote of the members in good standing voting in a member-

(3) The text of the By-laws appears in appellants' brief at pp. 3-4.

ship referendum conducted by secret ballot." (29 U.S.C. §411 (a)(3)(A)).

In the case of DISTRICT COUNCIL NO. 16, which is a labor organization other than a local labor organization or a federation of national or international labor organizations, dues increases can be accomplished only "(i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by laws of such labor organization: Provided, that such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization." (29 U.S.C. §411 (a) (3) (B))

The By-laws of DISTRICT COUNCIL NO. 16 do not provide for a convention, regular or special, nor do they give the executive board authority, express or implied, to increase dues. (See Exh. 2)

Effective as of July 1, 1965, local unions 127, 478, 560 and 1178, together with other housepainter local unions within DISTRICT COUNCIL NO. 16, and elsewhere in the San Francisco Bay Area, negotiated a wage increase equal to 50¢ per hour, or \$3.50 per day for a seven-hour day. (R. 34) In January, 1966, delegates to DISTRICT COUNCIL NO. 16 voted to apply Article VI, §6 (d) of the By-laws to increase the rate of dues, and by a vote of 18 - 16, purported to increase the dues of plaintiffs' members by \$1.75 per month to a new rate of \$10.60 per month,

per member. (R. 34; Exh. 5)

Pursuant to Article VI, §5 of the By-laws, all housepainter local unions are required to pay a special per capita tax to the District Council for a special fund, at the rate of \$3.25 per member, per month.

(R. 34) In April, 1966, the delegates to the District Council, applying Article VI, §6 (d) of the By-laws, purported to increase the special per capita tax by 90¢ per member, per month, to a new rate of \$4.15 per member, per month. (R. 34; Exh. 6)

The net effect upon the union member was that he would be required to pay to the local union additional dues at the rate of \$1.75 per month, or total dues at the new rate of \$10.60 per month, of which \$4.15 would go to the District Council.

Before instituting this action in the District Court, plaintiffs had exhausted all hearing procedures provided them in the Constitution of the Brotherhood and the By-laws of DISTRICT COUNCIL NO. 16 with reference to any grievance or complaint they had with respect to the action of DISTRICT COUNCIL NO. 16. (R. 37)

There were two cases in the District Court. In one, the plaintiffs were individual members of Painters Union, Local 487 (R. 1-2) In the other, the plaintiffs in the Amended Complaint were three local unions (No. 127, No. 560 and No. 1178) and individual members of these locals. (R. 77-78) The cases were consolidated for trial.

There were four causes of action stated in the Amended Complaint. The first sought to enjoin the District Council from enforcing the dues increase of \$1.75 per month, per member, upon the ground that the increase was imposed in violation of 29 U.S.C. §411 (a) (3) (A); the second sought to enjoin the District Council from enforcing the increase in the

special per capita tax upon the ground that the increase was imposed in violation of 29 U.S.C. §411 (a) (3) (B); the third sought a declaratory judgment, declaring that both increases are illegal and void; and the fourth invoked the pendant jurisdiction of the court to enjoin enforcement of both increases upon the ground that they were imposed in violation of the plain requirements of the By-laws of the District Council and the Constitution of the international Brotherhood.

The District Court granted the injunction and declaratory relief sought in the first three causes of action. (R. 49 - 50) The opinion of the District Court, which constituted its findings of fact and conclusions of law, is reported, sub nomine, Painters Union Local 127 et al. vs. District Council of Painters No. 16, et al., 278 Fed. Supp. 830.

I

THE DUES INCREASE UPON THE MEMBERS OF THE AFFECTED LOCAL UNIONS IS CON- TRARY TO THE PROVISIONS OF THE LAND- RUM GRIFFIN ACT.

The Landrum Griffin Act provides as follows:

"(3) Dues, initiation fees, and assessments. — Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except —

"(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership

meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot;" (29

U.S.C. §411 (a) (3) (A))

It would appear without dispute that the dues increase of \$1.75 per month, per member, for the housepainter local union members was not accomplished as set forth in the foregoing provision of the Landrum Griffin Act. It is conceded that no such vote ever took place. (R. 34)

However, appellants contend that the effect of Article VI, sections (a) and (d) of the By-laws of DISTRICT COUNCIL NO. 16 fix a rate of dues for union painters at \$8.85 per month, plus the amount of any wage increase for one working day per month, unless waived by the District Council. They argue from this that the increase of dues made in 1966 by the District Council for the members of its affiliated locals was an increase in amount, not in rate. In support of this contention, appellants rely chiefly on Zentner vs. Musicians Union, 237 Fed. Supp. 457, D.C. S.D.N.Y. 1965. This case is not in point and does not support appellants' position. The principal issue in that case was whether a local union could impose dues on members of other locals working within the territorial jurisdiction of the first local, without permitting the traveling members to vote thereon. (See, 278 Fed. Supp. at p. 461)

The language from Zentner quoted by appellants is dictum. (App. Br., pp. 7 - 8) But even if the dictum is read to declare that a dues structure is lawful where dues are determined by a fixed percentage of earnings, it has no application to this case, because no such dues structure is present in this case.

Appellants' complete reliance on Zentner and their criticism of the District Court's analysis of the dues in relation to earnings, betrays a failure to understand or appreciate the plain meaning of the word "rate." It is true that in Zentner, where the dues were a fixed percentage of earnings, the amount of dues paid increased or decreased with an increase or decrease in earnings. It is also true in the painters' case that, where Article VI, §6 (a) fixed dues at the rate of \$8.85 per member per month, the percentage of dues to earnings varied as earnings varied. But in both cases there was one fixed quantity; that is, the percentage in Zentner and the amount under Article VI, §6 (a). But when Article VI, §6 (d) is applied, neither the percentage nor the amount remain fixed in the By-laws, and persons not authorized by the statute have power to change not only the amount, but also the percentage.⁽⁴⁾ As the District Court so convincingly demonstrated, no matter how one compares the challenged dues with prior dues, both the amount and the percentage to earnings increased in 1966. (278 Fed.Supp. at pp. 832-833) Necessarily, therefore, the rate of dues has been increased.

This analysis is the only one which is consistent with the dictionary definition of rate as "a fixed relation of quantity."

This concept of rate is also consistent with the language of the cases. Thus, in King v. Randazzo, 234 Fed.Supp. 388 (D. C. S. D. N. Y. 1964), the court said that the increase governed by the statute is "an enlargement or augmentation of the present dues" and that where there has been an increase must be determined by "its direct effect upon the financial burden of the individual members." (234 Fed.Supp., at p. 394)

(4) In this case, 34 delegates, by a split vote of 18 - 16, purported to increase the dues of 4,000 union painters by \$1.75 per member per month. (R. 32 - 34; Exh. 5)

This language was quoted with approval by the Court of Appeals for the First Circuit. (Local 2 vs. Telephone Workers, 362 Fed. 2d 891, 894 (1st Cir., 1966))

The increase having been accomplished without the procedural safeguards set up in the statute is necessarily void and of no effect.

II

THE INCREASE IN THE SPECIAL PER CAPITA TAX IS CONTRARY TO THE PROVISIONS OF THE LANDRUM GRIFFIN ACT.

The Landrum Griffin Act al so provides as follows:

"(3) Dues, initiation fees, and assessments. — Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959, shall not be increased, and no general or special assessment shall be levied upon such members, except —

"

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership

referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization." (29 U. S. C. §411 (a) (3) (B))

Appellants make no contention on appeal concerning the purported increase of the special per capita tax due the District Council from each local. Suffice it to say here that on the effective date of the Landrum Griffin Act, this special per capita was fixed in the Council's By-laws at \$3.25 per member, per month. In April, 1966, the Council purported to increase this per capita by 90¢ per member, per month, to a total of \$4.15 per member, per month.

This per capita tax is clearly a type of dues covered by the Act and at oral argument the District Council abandoned its alleged distinction between a tax paid by the local to the District Council and dues paid by a member to his local. (See, Painters Union 127 v. District Council of Painters No. 16, supra, 278 Fed. Supp. at p. 831, footnote 2) This abandonment was sound in view of Local 2 v. Telephone Workers, 362 Fed. 2d 891, 894-895 (1st Cir. 1906).

The District Council's failure to discuss this aspect of the case in its brief would indicate that it now concedes the invalidity of the increase in the per capita tax. Such a concession would seem to be in accordance with the facts and the law. The increase in the per capita tax was accomplished without the aid of any formula or provision in the By-laws,

except the bare power given to the delegates to decide how much of the alleged automatic dues increase will be added to the per capita tax. An increase in per capita taxes can only be made in compliance with the requirements of 29 U.S.C. §411 (a) (3) (B). (Local 2 vs. Telephone Workers, supra) It is conceded that there was no compliance with the statute. (R. 34 - 35) That concession would seem to end the matter and establish the invalidity of the purported increase in the special per capita tax.

C O N C L U S I O N

We are not here dealing with a mere technical violation of the federal statute. We are dealing here with a case which goes to the very heart of the problem sought to be solved by the reforms incorporated into the Landrum Griffin Act. In this area, Congress obviously intended to insure to each union member the right to be heard by secret ballot on the issue of whether or not his dues shall rise. See, for example, Brotherhood of Painters vs. Painters Union Local 127, 264 Fed.Supp. 301, at p. 307, D.C. N.D. Calif. 1966.

Plaintiffs seek nothing more. If the majority of the 4,000 members of the housepainter local unions decide that an increase in dues is justified and necessary, plaintiffs will, and, of course, must abide by the result. But this is an issue for the members to decide. Under the judgment and decree of the court below, that is

where the issue is placed. This judgment and decree ought to be affirmed.

Dated at San Francisco, California, August 27, 1968.

Respectfully submitted,

Francis J. McTernan

Garry, Dreyfus, McTernan & Brotsky .

Attorneys for Appellees.

NO. 22,743

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 2 1963

LEE EDWIN ALLEN PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

DEC 1 1962

WILLIAM B. LUCK

Upon Appeal from the Judgment of the United States
District Court for the District of Oregon

BRIEF FOR THE APPELLEE

SIDNEY I. LEZAK
United States Attorney
District of Oregon

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NOTE

The Court's copies of all transcripts of pre-trial proceedings were re-numbered by the Court Reporter prior to forwarding them to the Court. Unfortunately, he did not advise us that he was doing so and we were unable to obtain copies from the Court. Our references to pre-trial transcripts will therefore be dependent upon the numbering system of our transcripts which we will submit to the Court at the time of argument, or sooner if the Court desires.

In our Brief we will refer to the Clerk's Record as (R), to the Trial transcript as (TR) and to the pre-trial transcripts as (TR) with the specific date and our page number.

Unfortunately defendant does not appear to distinguish between the Clerk's transcript, the pre-trial transcript and the trial transcript in every instance.

STATEMENT OF THE CASE

Defendant has made no statement from which the Court could glean an understanding of the case.

Defendant was convicted by a jury on all counts of a three-count indictment. The first count charged defendant with unlawful possession of a counterfeit \$10.00 Federal Reserve Note in violation of 18 U.S.C. § 472. The second count makes the same charge with respect to a \$5.00 note. The third count charges defendant with unlawful possession of a plate from which an obligation of the United States is printed in violation of 18 U.S.C. § 474.

In May 1965, about one month after one Charles Slaney purchased a 1250-type multilith press (Gov.Ex. 16), the defendant had some conversations with him about whether Slaney could make a duplicate of some Canadian currency (Tr. 100-1). Slaney had no technical knowledge and defendant took the press in approximately October 1965 with the aid of a man called Lino or Linus (Tr. 103). Slaney also gave Parker some blank plates, paper and some green inks and received \$250 from Parker for the use of the press (Tr. 104).

Slaney had purchased some green inks which Parker had described and asked him to get and in January 1966 he furnished additional ink for Parker (Tr. 107).

Parker, in January 1966, had brought a box containing credit cards, Oregon and Washington titles and some plates to Slaney's house, which bore impressions of \$10, \$20 and \$50 bills (Tr. 105-108).

In January 1966, Parker returned the press to Slaney's residence at 2706 S.E. Ash Street, Portland, Oregon, where it remained (Tr. 108-109).

In March or April of 1966, Slaney saw the box containing plates which Parker had left with him in Parker's living room (Tr. 110).

On August 17, 1966, defendant's 16-year-old daughter, Sandra Parker, was residing with him at 11945 S.E. Merrill Drive in Portland (Tr. 199). She was cleaning the house and when she moved a footlocker (Gov. Ex. 2) to clean under it she found a sack of uncut counterfeit \$5 bills. (Tr. 200). Later that day she looked in the footlocker and found two boxes of counterfeit money (Gov. Ex. 2c & 2d) (Tr. 202-3). She then called her mother, Wilma Niver, defendant's former wife, and took one of the uncut counterfeit \$5 bills to Mrs. Niver that night (Tr. 204). [That bill is Gov. Ex. 1.] She asked her father about the footlocker that night, and he told her that was his "gold" and that she should stay out of it (Tr. 205). Mrs. Niver and Sandra gave the note to Special Agent John Wells the following day, August 18, 1966, (Tr. 233).

Based upon the information obtained from Sandra Parker and on the counterfeit bill which was given to him, Wells obtained a search warrant on the following day from Commissioner Clare Mundorff (Tr. 242).

A search was thereafter made of the defendant's residence resulting in the finding of the counterfeit bills in the footlocker (Tr. 243-249) and printing plates bearing impressions of counterfeit bills (Tr. 250) (Gov. Ex. 2a).

After finding the materials in the footlocker, Secret Service Agent Frank Keneey searched the defendant and found three counterfeit bills, two tens and a five, in defendant's wallet set apart from the genuine currency also contained therein (Tr. 452).

One of those \$10 bills is Gov. Ex. 7 which is the bill for possession of which defendant is charged in Count I of the Indictment.

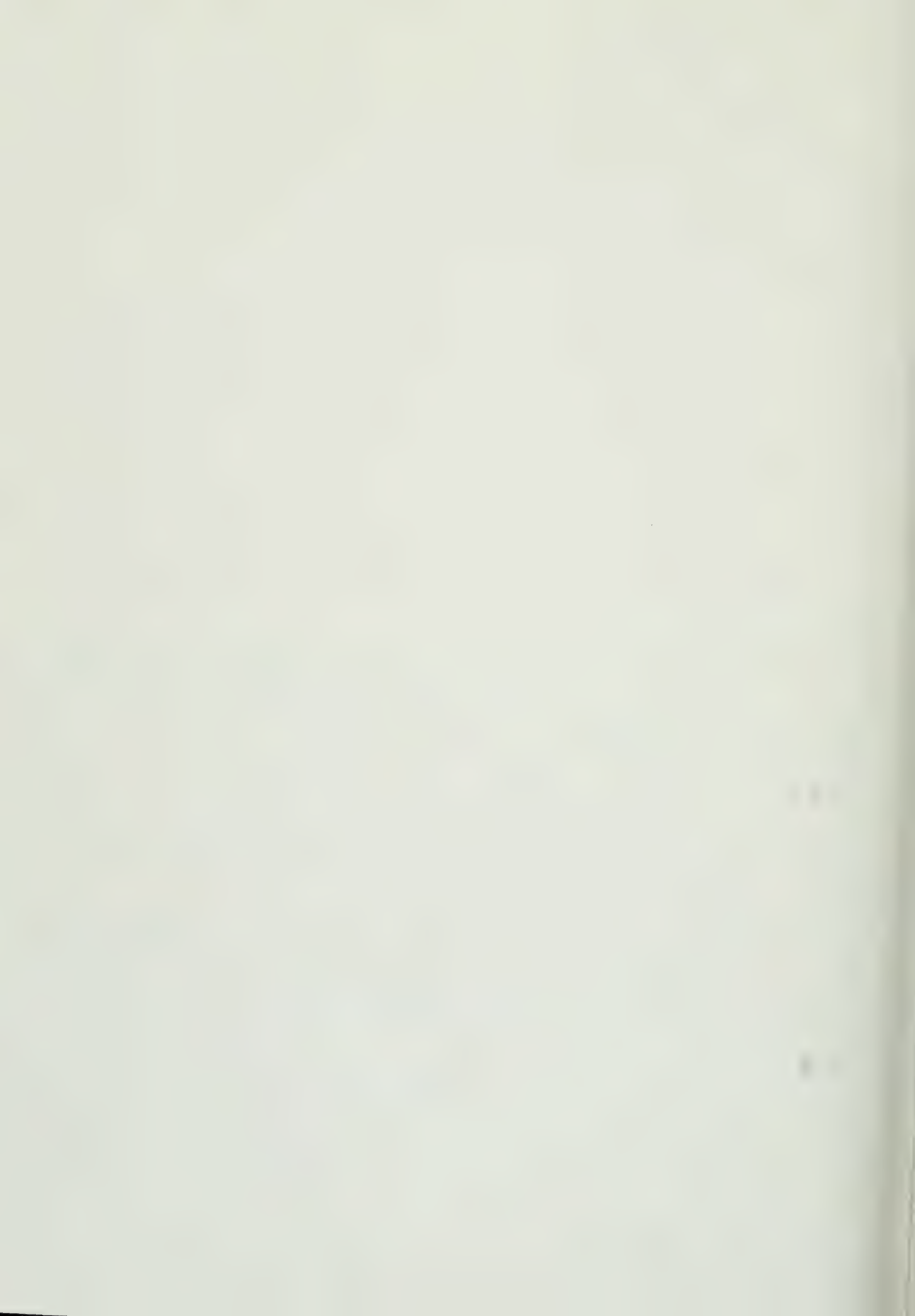
Gov. Ex. 8 is a counterfeit \$5 bill taken from the footlocker in defendant's residence and that is the bill for which defendant is charged in Count II of the Indictment (Tr. 256).

Gov. Ex. 9, found in the footlocker, is an offset metal plate, the possession of which was charged in Count III of the Indictment (Tr. 266).

On the next day Special Agent Wells obtained a search warrant for the Slaney residence and found the printing press, supplies and counterfeit \$5 notes (Tr. 276).

Mr. Wells testified that Gov. Ex. 13, which is one of the \$5 bills found in the Slaney residence is the same as Gov. Ex. 1 which Sandra Parker found in Parker's residence.

An expert testified that Ex. 9, the plate, had been used to make Ex. 8 (Tr. 388) on the printing press found in Slaney's basement (Tr. 391).



INTRODUCTION TO ARGUMENT

It is impossible to understand the building of a voluminous record in such a comparatively simple case without some understanding of the defendant, Mr. Parker.

He referred to himself as a "jailhouse lawyer" (Tr. 907) and shortly before this trial was acquitted on a murder charge in which he represented himself after two prior convictions had been set aside. (Tr. 1039-40). It is apparent from the record that the courts and prosecution were taking unusual steps to meet his vociferous objections and complaints at every stage of the proceedings in order to see that his rights were not violated.

The record shows that there were at least thirteen pre-trial hearings covering the various matters to which defendant took exception and for which he has been given transcripts. The Court provided him with three attorneys (Messrs. Peterson, Kowitt, and Epstein) at various stages of the proceedings. He was provided an investigator and an expert witness from government funds.

He and his attorneys were shown all government exhibits long before trial and were given the statements of all witnesses prior to trial. (Tr. 73-74).

The government and the Court went far beyond that which the rule requires.

He was given two continuances and the Court took special precautions to avoid the effect of publicity, for part of which he was responsible. (Tr. Dec. 14, at p. 60)

On January 5, 1967, his bond was reduced to \$5,000 and he made bail and was released to actively participate in his own defense, which he did.

A. Warrant of August 19, 1966 for 11945 S.E. Merrill

Part of the confusion engendered by defendant's brief on this point is due to defendant's unwillingness at the start of his discussion of the warrant for 11945 S.E. Merrill Drive to set forth the statement of John E. Wells which appears at page 19 and 20 of the Clerk's record. That statement is incorporated by reference into the form affidavit of search warrant (R. 18) to which Mr. Wells has sworn and reads as follows:

Statement of John E. Wells, Special Agent, U.S. Secret Service

"On August 18, 1966 I interviewed Wilma Niver and her daughter, Sandra Parker, at 9115 N.E. Hoyt Street, Portland, Oregon. They advised me that Mrs. Niver is the former wife of Lee Edwin Allen Parker and Sandra Parker is the daughter of Mrs. Niver and Lee Edwin Allen Parker.

"At that time Mrs. Niver delivered to me a counterfeit \$5.00 Federal Reserve Note, Serial No. L58976705C, Check Letter H, Face Plate 151, Back Plate 2120, Series of 1950A. Mrs. Niver advised me that she obtained said counterfeit Federal Reserve Note from her daughter Sandra Parker.

"Sandra Parker stated to me at that time that she had obtained this bill from the residence of her father, Lee Edwin Allen Parker, at 11945 S.E. Merrill Drive, Portland, Oregon, on the afternoon of August 17, 1966, having found it on the floor of said residence underneath a trunk. She further stated that she opened the trunk and observed its contents which consisted of numerous sheets of paper bearing impressions of \$1.00, \$5.00, \$20.00 and \$50.00 counterfeit bills.

"Sandra Parker stated that she delivered the bill which she found at 11945 S.E. Merrill Drive to her mother, Mrs. Niver, and that it was the same bill that Mrs. Niver had then delivered to me. I have retained said

bill in my possession.

" I have reason to believe the truth of the information supplied by Sandra Parker for the reason that she furnished other information to me which is known to me to be true, including the statement that one Charles Slaney had resided in the vicinity of S.E. 27th Avenue & Ash Street, Portland, Oregon, and that Slaney was presently serving a term in jail."

It should also be noted that the search warrant for which this affidavit was given is at page 13 of the Clerk's record. The grounds for the affidavit of search warrant are set forth in the statement of Mr. Wells. Defendant seems to contend that because the grounds are not stated at the place provided in the form or in the exact language of rule 41(b) that the affidavit is defective.

In U.S. v. Meeks, 313 F.2d 464 (C.A. 6, 1963) the Court said referring to a situation like this where statements were attached to the official printed form of the affidavit -

"The real question is, were the attachments fastened to the instruments at the time of their execution so as to constitute one complete document, in which event it would not be necessary that they be separately signed. Clay v. U.S. 246 F.2d 298, 303, C.A. 5th. In the present case the printed form expressly refers to an attachment and the attachment is physically stapled to the form.

Although it was a careless way in which to handle the matter, without better identification and one of which we do not approve, the two papers appear to be one complete document regular on its face, supported the presumption that the Commissioner properly performed her duty. U.S. v. Brooks, supra. Appellant offers nothing to attack the validity of the instruments except the suggestion of the possibility that the Commissioner did not perform her duty. We believe that is insufficient

to invalidate the instruments." 313 F.2d 464, at page 466.

The question therefore is whether, looking to the affidavit as a whole, grounds are stated sufficient to justify its issuance by the Commissioner.

Here the agent not only had the hearsay evidence of defendant's daughter as to the large numbers of counterfeit bills concealed in defendant's home, but he actually had one such bill in his possession which had been given to him. Since a warrant may issue for property "designed or intended for use or which has been used as the means of committing a criminal offense." Rule 416, F.R.C.P. and since this quantity of counterfeit money could be used for no legitimate purpose, there was ample justification for the Commissioner's issuance of the warrant.

This Court must consider the actions of the agents under the standards set by U.S. v. Ventresca, 380 U.S. 102 at page 108.

"... affidavits for search warrants must be tested and interpreted by magistrates and Courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

To require the agents to allege that the counterfeit bills which were stated to be in violation of the law were also being held with "intent to defraud" would be a highly technical requirement without substance.

Unlike those cases cited by defendant in which the Court held the

allegations insufficient to show the illegality of the intended use. Counterfeit money is described as being held by Parker in violation of the law. In U.S. v. Petrone, 185 F.2d 334 (C.A. 2, 1950) discussed more fully infra the Court pointed out that there was no honest use for a quantity of counterfeit bills. Intent to defraud can be inferred from possession.

Defendant's next point is that because the Government alleged that Lee Parker "held" the money, only a search of his person was warranted. The Government contends that the meaning given to the word "held" also encompasses "to have in one's keeping" - Webster's Seventh New Collegiate Dictionary (1963).

As to the allegation that the search of Lee Parker's person was unlawful, it would be ridiculous to require that the counterfeit money actually be seen or felt on his person before a search could be authorized.

Counterfeit money, as has been pointed out, is made to be passed and it would be a normal assumption that an adult male on those premises might have some on his person for use.

It should also be noted that even if the warrant was insufficient to search defendant's person he could have legally been searched incidentally to his arrest after the agents discovered the contents of the footlocker, Jones v. U.S., 362 U.S. 257 (1960). That the agents took the conservative approach of procuring a search warrant for the defendant's person is to their credit and in keeping with the spirit of Ventresca.

Another of defendant's contentions is that the reliability of the uniform is not established. This completely ignores the fact that Sandra

Parker had a counterfeit bill with her and was present when her mother gave it to Agent Wells.

The case of U.S. v. Jordan, 216 F. Supp. 310 (1963) is cited by defendant, apparently for the proposition that cash not described in the warrant was illegally seized.

In that case, however, the discovered cash not described in the warrant was bona fide and did not fit the specific description contained in the warrant. There being nothing to connect the specific true bills of different denominations with the warrant or the crime they were properly returned by the Court which approved the balance of the seizure.

Here the \$10 bill was a part of the criminal conduct as well as evidence of the crime.

B. Warrant of August 20, 1966 for 2706 S.E. Ash.

The Government makes the same contentions with respect to the warrant of August 20, 1966 as the August 19, 1966 warrant. But in addition the Government contends that the defendant does not have standing to protest the seizure of property which he does not claim to have an interest in at a residence where he does not reside.

In the leading case on the subject, Jones v. U.S., 362 U.S. 257 (1950) the Court said at page 261:

"In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

Defendant does not have "standing" to protest the search at the Slaney residence.

ANSWER TO POINT II

Defendant was before the Commissioner at 9:30 P.M. on Friday night, August 19, 1966, (R. 2-3) counsel was appointed for him. The defendant demanded an immediate preliminary hearing and the record shows that Mr. Kenney, Secret Service Agent was ready to proceed but that defendant would not proceed without a court reporter.

There is no showing that a court reporter was available at that late hour and the Commissioner set the preliminary hearing for the following Tuesday, August 23, unless defendant's attorney could arrange for it earlier (R. 2).

Defendant's complaint about the failure to have a warrant seems to assume that one is required by Rule 9, F.R.Cr.P. In fact, Rule 9(a) provides for the issuance of a warrant "upon the request of the attorney for the government." Since the defendant was already in custody prior to the return of the indictment on August 26, 1966, there would be no occasion for the government to request a warrant.

Defendant cites some ancient law in claiming that something more should have been done by the Commissioner in connection with his commitment. The relevance of those cases to the present Federal Rules of Crim. Procedure is not apparent and no showing is made that the requirements of the rules were not met.

Defendant's own description of U.S. v. Klapholz, 230 F.2d 494, shows that it is inapplicable to this case. There is no contention that defendant was not promptly brought before the Commissioner in violation of Rule 5(a).

If Parker was illegally detained, such detention would not have commenced until such time as he was illegally denied a preliminary hearing and since he was brought before the Court on Monday, August 22, and the Court agreed at that time to hold the hearing on the following day, he has no complaint.

ANSWER TO POINT III

Defendant was not misled into believing that Mr. Slaney was not going to be a witness. There was a discussion on June 20, 1967, showing that Mr. Slaney was coming (Tr. 4) and the Court says at Tr. p. 81 after Mr. Peterson claimed surprise, "Well, he was mentioned the other day in our conference in Court Friday that the Government was going to subpoena him." There is also an attempt made to charge the government with misleading defendant by charging that Mr. Lezak led defendant to believe that the material picked up as a result of the second search warrant would not be used (pp. Br. 32).

The explanation for this statement is contained in testimony by Lezak called by defendant as an adverse witness by defendant:

"Q. I want to ask you, Mr. Lezak, at the preliminary hearing on August 26, 1966, in this courtroom, did you advise this man that the search warrant at the Slaney residence had nothing to do with his case, the case of U.S. vs. Lee Edwin Allen Parker?

"A. I have to explain. The answer is that I used substantially the words you are using, that I used, but what I was saying, Mr. Peterson, was that at that time the search of the Slaney residence had nothing to do--not with the case of U.S. v. Parker, but with the preliminary proceeding or preliminary hearing which was then being heard by the Court. We didn't feel it was necessary to introduce evidence which had been seized at the Slaney residence in order to produce enough evidence for the Court to hold Mr. Parker to the charge. We felt we had plenty." (Tr. 877-8)

Since all of the material seized at Slaney's residence was shown to defendant and contained in the exhibit list, it is clear that defendant was not led into believing that it would not be used.

ANSWER TO POINT IV

Efforts were made by the Court right from the start of this case to keep down the publicity which naturally attaches to a man of defendant's propensities and history.

Judge Solomon entered an order prohibiting photographs of the defendant and directed a newspaper reporter not to refer in his article to the finding of counterfeit bills in Parker's possession. (Tr. Aug. 22, p. 15, 18). The only person who gave opinions to a newspaperman was defendant himself.

On December 14, 1966 at a pretrial hearing defendant admitted that he had given an interview to the Oregon Journal alleging a "deal" between the state and federal government whereby he would get 45 years on counterfeiting and the state would drop the murder charge. (Tr. Dec. 14, 1966 pp. 60-63).

On March 27, 1967 defendant filed a motion to dismiss claiming adverse newspaper publicity. (R. 179). To this motion were appended two articles and an editorial. (R. 182-4). The Court in denying that motion stated as follows:

"Now it is to be observed from the moment of my statement neither one of the papers mentioned the subject which I criticized. Even during the course of the long trial in the state court the matter which I criticized was not mentioned in one press release, except in one of the papers on the last day, when the matter had been submitted to the jury. I understand that on that particular day the defendant here and the defendant there took the witness stand and made a full and complete explanation to the jury of the subject which I had condemned in my statement from the bench. After all, I have no hesitancy in criticizing the press when it is wrong.

On the other hand I have no hesitancy whatsoever in commending it when it does as good a job as was accomplished in the reporting of the murder case. That was objective reporting at its best (Tr. May 1-2, at p. 533-4)."

The last newspaper article about which complaint is made was published in March, 1967 prior to the impaneling of a new jury panel. This is not a Shephard v. Maxwell 384 U.S. 333, /U.S. v. Silverthorne 9th Cir. August 27, 1968 case in which there was pervasive publicity just before and during the trial and the Court was careful in its interrogation of the jurors with respect to this matter. (Tr. 25 et seq.)

In the case of Coppedge v. U.S., 272 F.2d 504, there was an article published in the newspaper the day before trial reciting opinions of both the judge and prosecutor with respect to the case.

In the cases of U.S. v. Accardo, 298 F.2d 133, the jury was exposed to newspaper publicity prejudicial to the defendant during the trial itself.

There is simply no analogy between those cases and the present one. It should also be considered that defendant himself brought out the fact of the murder charge in his counsel's opening statement to the jury. (Tr. 547).

In addition it should be noted that defendant was acquitted of the murder charge on the 3rd trial and the publicity may well have been more harmful to the government than to the defendant.

With respect to the suggestions emanating from the Advisory Committee on Fair Trial and Free Press of the American Bar Association, there was nothing shown to the Court in this trial that made it necessary to use this method.

ANSWER TO POINT V

Defendant was released from custody on bail on January 5, 1967, more than six months before the start of the trial. He was represented, as he admits, by " experienced and highly competent trial counsel."

The record demonstrates that he not only asked for more privileges than are given to ordinary prisoners but also that he received them.

But the main point of the government is that there is no showing that anything that was denied defendant affected his rights in any way, even assuming an improper denial.

We do not have before us the ex parte showing made by defendant to the Court for witnesses under Rule 17(b) but it should be noted that Parker's defense was simply that of complete denial of any connection with the counterfeit bills and paraphernalia that were found on his person and property.

Defendant does not show how any of the witnesses who did not come would have assisted in overcoming the overwhelming evidence of the guilt of defendant.

Defendant cites the case of Bandy v. U.S., 296 F.2d 882 in support of his contention that he was deprived of his rights by being refused some of the subpoenas which he requested. In that case the discretion of the trial judge was upheld and the Court quoted with approval the following statement:

"It is well settled that Rule 17(b) Federal Rules of Criminal Procedure, 18 U.S.C.A. under which the motion for subpoena was made does not accord the indigent defendant an absolute right to subpoena witnesses at government expense. There is and must be wide discretion vested in the District Court to prevent the abuses often attempted by defendants.

This Court will not disturb the exercise of the discretion unless exceptional circumstances compel it." 296 F.2d at p. 892.

If counsel's argument as to the failure of the Court to release Parker immediately were to be given any credence it would logically result in reversal for almost any case where the defendant is held in lieu of bail.

ANSWER TO POINT VI

The exception taken to the Court's instructions on Count III by the defendant do not raise the objections raised for the first time on appeal by defendant in point VI. The exception was on the claim that one plate cannot be used to make a counterfeit obligation which is the argument made in defendant's Point VII.

There was no exception taken at the trial to the instruction actually given by the Court with respect to Count III.

Defendant's attacks on the indictment are based upon his failure to consider the fourth paragraph of § 474 under which this charge is brought.

That paragraph reads as follows:

"Whoever has in his control, custody or possession any plate, stone or other thing from which any such obligation or other security has been printed, with intent to use such plate stone or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security or any part thereof." (Emphasis supplied.)

It is true that the first paragraph of § 474 does not make it a crime to intend to use the plate but that is not what is charged.

Defendant's contention with respect to the use of the word "knowingly" is also incorrect. The indictment does charge defendant with "knowingly" having "in his control, custody or possession" and the word "knowingly" is not used in that part of the statute under which defendant is charged.

There was no exception taken by defendant to the Judge's instructions with respect to the elements of the crime charged in Count III of the indictment.

The reason there were no exceptions is that the Judge's instructions were more favorable to the defendant than should have been given. Judge Kilkenny told the jury that the making of the plate was an element of the crime. Since it is sufficient to convict the defendant for the government to prove that the defendant had unlawful possession of the plate regardless of whether he participated in its making, the defendant got more than he was entitled to and this instruction could not have prejudiced him in any way. The balance of defendant's objections are not intelligible to us and a reading of Judge Kilkenny's instructions show that the jury was adequately instructed on the elements of possession and control and that there could not be any confusion about whether the plate was one which came within the statute.

Defendant's suggestion that the prohibitions in Title 18, Section 474, United States Code, are limited to unauthorized printings of genuine obligations of the United States can only be described as a non sequitur (Def. Brief, p. 59).

Count III of the indictment charges the defendant with a violation of paragraph 4 of Section 474 which proscribes possession of any plate similar to or in the "similitude of" any plate from which a genuine obligation of the United States has been printed with intent to use or to permit the plate to be used to counterfeit an obligation or security or any part thereof of the United States.

To adopt the otiose construction urged by the defendant would be to completely disregard the common sense and "plain meaning" principles of statutory construction as well as ascribe to the statute a meaning never intended by its framers.

It should not be overlooked that this novel point is now being urged for the first time. Nowhere during the trial or any of its various pre or post proceedings did defendant see fit to raise this point. His failure to do so has waived the same. See points and authorities on this subject in Point VIII, infra, of the Government's brief.

Defendant assigns as error the failure to take a multilith printing press, Government Exhibit 16, to the jury room during the jury's deliberations. Initially, it is important to note this exhibit was offered and admitted at the instance of the Government over objection by the defendant. The uncontradicted evidence with respect to this exhibit showed that various plates seized from the defendant's footlocker were or could have been used on this machine and that certain of the notes similarly seized from the defendant and Charles Slaney were made or could have been made from these plates (TR. 263-264, 266-267, 270, 386-393, 398, 403-404, 420; Govt. Ex. 8, 9, 10, 11, 14). It is therefore most apparent that error, if such existed, did not inure to the prejudice of the defendant but rather to the Government. It is also settled that the taking of papers, memoranda, or exhibits to the jury room is a matter within the sound judicial discretion of the court. Murray v. United States, 130 F.2d 442 (D.C. 1942); Miller v. N. Y. Central R. R., 239 F.2d 10, 14 (7th Cir., 1956); Shayne v. United States, 255 F.2d 739, 743 (9th Cir., 1958); C.I.T. Corp. v. United States, 150 F.2d 85, 91 (9th Cir., 1945).

Perhaps even a more important consideration is the size and weight of this exhibit.^{1/} Defendant's own witness, Harry Stanley,

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During the pretrial proceedings, defendant's counsel acknowledged the size and weight of the press made it difficult to move. He also considered the possibility that it might not go to the jury should it be received in evidence (TR. 7-8).

former owner of this machine, approximated its weight at close to 700 pounds (TR. 616). Moreover, the jury room was located one floor above the courtroom, and the only entrance to this room was a narrow winding staircase containing some twenty to twenty-five stairs. In the opinion of the seventy-two year old bailiff, no less than five to six people would have been required to transport this exhibit to the jury room (TR. 1032-1033). It should also be noted that the jury made no request to see this exhibit (TR. 1031-1032).

Defendant contends the record is devoid of any evidence suggesting the Court offered the jury the option of using the courtroom (where the press remained) for their deliberations (Def. Brief, p. 62). The record clearly reflects the contrary (TR. 998-999).

It is evident some element of practicality and realism must remain in matters of this sort. The plain truth of the matter is that it was simply not feasible to move this exhibit to the jury room. The reviewing courts are certainly cognizant of the multitude of problems experienced by trial courts in the administration of cases. In Sykes v. United States, 373 F.2d 607, 612 (5th Cir., 1966), the Court stated:

"In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure."

To the same effect, see United States v. D'Antonio, 362 F.2d 151 (7th Cir., 1966).

Defendant further contends the failure to swear the bailiff and the designation of the Court's law clerk as a "deputy bailiff" for purposes of removing exhibits to the jury room was error (Def. Brief,

p. 61). Defendant carefully neglects to note that neither of his trial counsel took exception in any way to this procedure although they were offered an opportunity to do so and did in fact object to certain other matters (TR. 999-1002, 1004). The cases are legion that issues, even if constitutional, not properly raised and preserved in the trial court for review, will not be noticed on appeal. See for example, United States v. Millpax, 313 F.2d 152, 156-157 (7th Cir., 1963), cert. den. 373 U.S. 903; United States v. McCarthy, 297 F.2d 183, 184 (7th Cir., 1961), cert. den. 369 U.S. 850; United States v. Greenberg, 268 F.2d 120, 123-124 (2nd Cir., 1959); Minor v. United States, 375 F.2d 170, 172 (8th Cir., 1967), cert. den. 389 U.S. 882; United States v. Miller, 316 F.2d 81 (6th Cir., 1963), cert. den. 375 U.S. 935; and Hansberry v. United States, 295 F.2d 800, 801 (9th Cir., 1961). See also Meyer v. United States, ___ F.2d ___ (9th Cir., 1968), No. 22,358(A). The only exception to the foregoing proposition is where failure to consider the point on appeal would result in an obvious miscarriage of justice despite defendant's failure to raise the issue in the trial court (R. 52(b), Federal Rules of Criminal Procedure). Not only does the record in the instant case not warrant the invocation of the "plain error" doctrine, but defendant himself makes no such suggestion.

In any event, the question of whether a "permanent oath" can be administered (TR. 999) and the omission to swear the deputy bailiff (TR. 1004) do not warrant reversal absent a showing of prejudice to the defendant as a result thereof. See C.J.S., Vol. 23 A, Criminal Law Sections 1353, 1354. See also United States v. Davis, 103 F. 457,

469 (5th Cir., 1900). It is all too clear defendant has made no such showing nor has there been even the slightest attempt to do so.

Count III of the indictment charges the defendant with possession of a particular offset printing plate used to produce a certain counterfeit five-dollar Federal Reserve Note. The indictment then describes the note in detail, including the serial number (L68014450C).

During the course of the trial, an offset metal plate found in defendant's residence and bearing the face and back impressions of a five-dollar bill was offered in evidence in support of the charge in Count III (TR. 263-265; Govt. Ex. 9). When an objection was interposed on the ground the plate contained no serial number of any description, the Government was given leave of Court to have the number specified in Count III of the indictment stricken as surplusage (TR. 265-267, 538). Such a procedure is now assigned as error on the theory it was, in fact, an unauthorized amendment of the indictment (Def. Brief, pp. 63-66).

The term "surplusage" is defined as "any fact or circumstance laid in the indictment which is not a necessary ingredient of the offense." Johnson v. Biddle, 12 F.2d 336, 369 (1926). It is well settled that portions of the indictment not affecting its substance may be stricken as surplusage. Johnson v. United States, 207 F.2d 314, 320 (5th Cir., 1953), cert. den. 347 U.S. 938; Williams v. United States, 179 F.2d 656, 659 (5th Cir., 1950), affirmed 341 U.S. 97; United States v. Krepper, 159 F.2d 959, 971 (3rd Cir., 1947), cert. den. 330 U.S. 824. In Soper v. United States, 220 F.2d 158, 161 (9th Cir., 1955), cert. den. 350 U.S. 828, the defendant was charged with assault with a dangerous weapon described in the indictment as

an "M-1" rifle". No evidence was introduced during the trial as to the make of the weapon and the Court instructed the jury that the words "M-1" appearing in each count of the indictment were stricken and should not be considered. Defendant assigned this instruction as error contending it constituted an "amendment" of the indictment. On appeal, the Court found the words deleted nothing more than "non-prejudicial surplusage" and therefore no error was committed by instructing the jury to disregard same. See also the analogous case of Heisler v. United States, 394 F.2d 692 (9th Cir., 1968). Although disapproving amending, correcting, or changing the body of an indictment, no error was found in the trial court permitting the Government to correct the denomination of a counterfeit note which was improperly described in the indictment. Authorizing the Government to make the requested change was held to be "a work of supererogation" and could be "disregarded as harmless since * * * it was void, and * * * the face amount of the note was not an essential element of the offense." Heisler v. United States, supra, at Page 696.

Whether the serial number in Count III of the indictment in the case at bar is determined to be simply surplusage which may be stricken, Heisler v. United States, supra, at Page 696, N. 7, Soper v. United States, supra, or whether the Court's order permitting it to be stricken was "void", the number itself affects neither the substance or validity of the count and thus the error, if any, is harmless. Heisler v. United States, supra; Rule 52(a), Federal Rules of Criminal Procedure.

With respect to the question of variance, an examination of the

record clearly dictates the defendant was fully informed of the charge so as to enable him to prepare both his defense and to be protected against the threat of double jeopardy. Heisler v. United States, supra, at Page 694. As in Heisler, the defendant in the instant case was neither surprised nor prejudiced by the Government's motion to strike the serial number from Count III. An outstanding order of the Court required the Government to "produce everything" (TR. 15). In compliance with this order, the Government furnished the defendant prior to trial with a complete list of all witnesses, save one, their statements, made certain of the witnesses available for interviews, and disclosed and permitted examination of each and every exhibit (TR. 6, 14-15, 81, 90). In view of the complete discovery afforded, it is difficult to imagine how the defendant could have been surprised nor can it be said the variance affected his "substantial rights". It is similarly clear the offense described in Count III is complete irrespective of the serial number.

Defendant further contends it was improper to admit Government's Exhibit 10, an offset plate found in the defendant's residence and containing the serial number described in Count III (Def. Brief, p. 63; TR. 266-267). He theorizes that since the indictment described but one plate and the evidence conclusively showed that no single plate could make one particular note, no other plates with respect to this count could be admitted for any purpose.

Count III of the indictment charges a violation of Title 18, Section 474, United States Code, paragraph 4, which provides that:

"Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;" (Emphasis added)

shall be punished.

It is obvious from the foregoing statute that any plate offered by the Government in support of Count III need not be capable of printing an entire counterfeit obligation; the capability to print any part of a counterfeit obligation is sufficient to constitute a violation.

The admission of other plates by the Court, one of which, when coupled with the Count III plate, would produce the entire face of the counterfeit obligation described in Count II, was proper to prove intent, an express requirement of the aforementioned statute. It is axiomatic that in a criminal prosecution any type of evidence should be admitted which is probative in nature and which is neither excluded by a settled rule nor particularly likely to be false, misleading, or unduly prejudicial. Griffin v. United States, 183 F.2d 990 (D.C., 1950); United States v. Matot, 146 F.2d 197 (2nd Cir., 1944). Further the exhibits complained of clearly fall within the ambit of the trial court's wide latitude in determining the relevancy and materiality of evidence which will not be disturbed on review absent an abuse of discretion. Wilson v. United States, 250 F.2d 312 (9th Cir., 1957), reh. den. 254 F.2d 391 (1958). See also United States v. Quarles, 387 F.2d 551 (4th Cir., 1967); Wangrow v. United States, 399 F.2d 106, 115 (8th Cir., 1968); 43 Nebraska Law Review, No. 3, Pages 485, 531.

ANSWER TO POINT X

Defendant has now received a copy of a letter from the Administrative Office of the U.S. Courts, approving the arrangement under which Commissioner Munderff is serving.

We assume that will eliminate this contention.

ANSWER TO POINT XI

In interrogating the jury on voir dire the Court asked: (TR 22)

"All right. With the group to the left, is there any one of the jurors who has ever been connected in any way with the laws in connection with a counterfeiting operation or with counterfeit money or securities of any kind?"

This question to which the juror responded was obviously asked for the protection of the defendant. No attempt is made by defendant to show that he was prejudiced in any way by the Court's refusal to seat the juror.

The general rule is that the matter of excusing jurors is left to the sound discretion of the trial judge, the exercise of which will not be interfered with unless it is clearly shown to have been abused to the actual prejudice of the complaining party. 50 C.J.S. 938-9; see Yoho v. U.S., 202 F.2d 241 (C.A. 9, 1953); Bateman v. U.S., 212 F.2d 61, 66 (C.A. 9, 1954).

"It is well settled that the court may of its own motion reject or discharge from the panel a juror who is disqualified, unfit or incompetent to serve, although he is not challenged or objected to by either party . . . even over a party's objection . . . 50 C.J.S. 1005 et seq."

On this appeal, for the first time, defendant contends that there is insufficient evidence of "intent to defraud" from the concealment by Parker of the counterfeit money which he possessed.

A case squarely in point is U.S. v. Petrone, 185 F.2.d 334. (C.A. 2, 1950).

In that case F.B.I. agents came upon \$5100 in counterfeit \$10 bills which defendant said was brought in by a "rat."

The Court said at p. 336:

" . . . Furthermore, once we suppose that Petrone was in possession of the money, his intent to use it fraudulently follows. Such bills have no honest use except when they are in the possession of public authorities as evidence or the like. One might discover that a single bill, or conceivable two or three, had been passed upon one, and perhaps one might keep them without intent to defraud, though even that is doubtful; but nobody in possession of \$5100 counterfeit money innocently keeps it; its possession is to the last degree perilous, and the possessor, if honest, will either destroy it straightaway or turn it over to the authorities."

The government contends that defendant did not intend to use this money to play "monopoly", or for some other innocent pursuit and that the jury was entitled to believe that he kept it with "intent to defraud."

ANSWER TO POINT XIII

The first attorney appointed for Mr. Parker, Edward Epstein, expressed defendant's position on counsel to the Court as follows:

MR. EPSTEIN: It's my understanding he has no objection to my representing him so long as he is allowed carte blanche to express whatever views he has to the Court or any point which I don't feel to be relevant or material, and take whatever other action that I, for whatever reason, don't feel is warranted.

THE COURT: Does he want to interrogate witnesses:

MR. EPSTEIN: I think on the basis of my conversations with him, I would say he would intend to ask for the right to put questions to witnesses, which questions I didn't feel proper for any reason.

MR. LEZAK: Your Honor, I think there was one more thing he stated that he wanted. He wanted the right to disassociate himself from any statement made by counsel with which he disagrees.

THE COURT: In other words, if his attorney does something he wants the right not to be bound by that, is that correct also Mr. Epstein?

MR. EPSTEIN: I'm not sure if that is correct - - exactly correct. He said he wouldn't be bound by anything I represented in Court or agreed to in Court unless he was present. (Tr. Aug. 22, 23-4).

The defendant on the next day said to the Court in response to a question as to his dissatisfaction with Mr. Epstein:

THE DEFENDANT: No, sir, I'm not dissatisfied; nor shall I be bound by anything he says or does. . . (Tr. August 23, 28)

This is the background for the Court's ruling that defendant could not have it both ways at the time of the preliminary hearing. The Court's ruling was in keeping with the rule of this Circuit in Duke v. U.S., 255 F.2d 721 (1958) cert. den. 357 U.S. 920.

In that case, the defendant was a lawyer who desired to associate another attorney to participate in his representation. The trial Court ruled that the other attorney was to have full control of the case. The Court approved the trial Court's statement to defendant that:

"the obligation of Duke was to appear in propria persona or be represented by counsel, but that he did not have a right to a hybrid of the two." 255 F.2d 721, 725.

Notwithstanding Judge Solomon's ruling, defendant was permitted by Judge Kilkenny to participate actively in his trial. He gave part of the opening statement and argument and interrogated witnesses. Again defendant has failed to show how he was prejudiced in any way by the Court's ruling in view of the full disclosure of the evidence made by the prosecution in this case.

ANSWER TO POINT XIV

In its opinion denying the motion for a new trial the Court said: (R. 244).

"Finally, defendant contends that the Court erred in failing to require the Government to name the confidential informant who supplied the information in support of the affidavit of John E. Wells to search the premises at 2706 S.E. Ash Street in Portland. Previously, the Court viewed in camera the F.B.I. report in connection with this confidential informant. I was then of the belief that the name should not be disclosed and found, and now find, that the informant had absolutely no connection with the alleged counterfeiting operation. I will now seal a copy of the report and deliver it to the clerk for transmittal to the Court of Appeals, in the event of an appeal in this cause. On these facts the defendant is not entitled to this information." McGray v. Illinois 386 U.S. 300 (1967); Powell v. U.S. 374 F.2d 386, (9th Cir. 1967).

Defendant's unsupported request for the name of the confidential informant who supplied information in support of the affidavit of John E. Wells to search the premises at 2706 S.E. Ash Street in Portland was properly denied. (See Government's letter of April 3, 1967 to the Court along with an F.B.I. report containing the name of the informant.)

Initially, it should be noted that the above address was not that of the defendant Lee Edwin Allen Parker but rather that of Charles Slaney, a Government witness. Moreover, the search of the Slaney residence took place after that conducted at Parker's home, and so far as the warrants and affidavits disclose, the two were unrelated. It is therefore questionable whether defendant has the requisite standing to even have made such a request. However, even assuming arguendo he had such standing, he was

nonetheless not entitled to the information sought.

The recent case of McGraw v. Illinois, 386 U.S. 300 (1967), 35 L.W. 4261, is dispositive of this question. In McGraw, petitioner was arrested by Chicago police officers pursuant to information supplied by an informant who had proven reliable on numerous occasions in the past. The information supplied stated the petitioner "was selling narcotics and had narcotics on his person and that he could be found in the vicinity of 47th and Calumet at this particular time." The officers then drove to this vicinity where the informant identified the petitioner and then departed. The arrest and the subsequent discovery of narcotics followed.

Petitioner filed a motion to suppress, at which time he requested the identity of the informant. The request was refused. In affirming, the United States Supreme Court found the detailed testimony of the arresting officers at the hearing respecting the circumstances of the arrest and the facts upon which it was based fully justified a finding of probable cause for the arrest and search.

With respect to the question of the informant's identity, the Court cited with approval Wigmore's Treatise on Evidence describing the testimonial privilege as

"A genuine privilege, on . . . fundamental principle. . . must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity--to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government

also has an interest in non-disclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.

"'That the government has this privilege is well established, and its soundness cannot be questioned.' (Footnotes omitted.) 8 Wigmore, Evidence § 2374 (McNaughton rev. 1961)."

The Court then distinguished Roviaro v. U.S., 353 U.S. 53 (1957), reversing the defendant's conviction for violation of the Federal narcotics laws, for failure of the Government to supply the name of the confidential informant. The Court noted the informant in Roviaro had been an active participant in the crime, personally playing a significant role in the defendant's procurement of the narcotics which were the subject of the indictment.

As in McCray, the record in the case at bar is devoid of even the slightest scintilla of evidence indicating the informant's participation in the case, either active or passive. His only role was to supply information based on which the warrant for the search of Slaney's residence was issued. With respect to an informant acting in such a capacity, the Court stated:

"Indeed, we have repeatedly made clear that federal officers need not disclose an informer's identity in applying for an arrest or search warrant."

To the same effect, see U.S. v. Rugendorf, 316 F.2d 589 (7th Cir., 1963), affirmed 376 U.S. 528 (1963), where a search warrant was issued based in part on information supplied from a reliable informant who had been in the defendant's residence and observed certain fur garments

described by the defendant as stolen. See also: Miller v. U.S., 273 F.2d 279 (5th Cir., 1959); Garcia v. U.S., 373 F.2d 806, 807 (10th Cir., 1967); and the recent Ninth Circuit opinion in Powell v. U.S., 374 F.2d 386 (1967). In Powell, defendant alleged the Court erred in rejecting his motion to disclose the identity of the Government's informant. The Court summarily disposed of this point with the trenchant statement that "there is no basis whatever" for such a contention. The Court then set forth the following rule, as well as the policy behind the so-called "informer's privilege":

"It is established that the Government is not required to reveal to an accused the identity of one who furnishes 'information of violations of law to officers charged with enforcement of that law', (citing Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.ED.2d 639, which in turn cites Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L. Ed. 151.


"A rule that any person who merely informs the officers of the commission of a crime must be disclosed to the accused as the one responsible for his arrest would serve to encourage the criminal to wreak his vengeance on the informer. Such information might be hard to come by; and such a rule would seriously hamper accepted police investigative techniques.

"If there was an informer in this case, there is nothing to show that he was more than a mere observer, not a participant. * * * It would be unthinkable to call for a reversal here in the complete absence of facts to support appellant's claim."

CONCLUSION

It is submitted that this Court should affirm the Judgment of the Court below finding defendant guilty on all three counts of the indictment.


Respectfully submitted,



SIDNEY I. LEZAK
United States Attorney
District of Oregon

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I have made service of the foregoing Brief for the Appellee on the Appellant, Lee Edwin Allen Parker, by depositing in the United States Post Office at Portland, Oregon, on December 18, 1948, a certified true, exact and full copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to Charles E. Springer, Esq., 333 Flint Street, Reno, Nevada, 89505, attorney of record for Appellant.



SIDNEY I. LEZAK
United States Attorney
District of Oregon
Of Attorneys for the Appellee

NO. 22745

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH JAMES WELLS,
Appellant,

v.

WALTER CRAVEN, Warden,
Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

APPELLEE'S BRIEF

FILED

JUN 11 1968

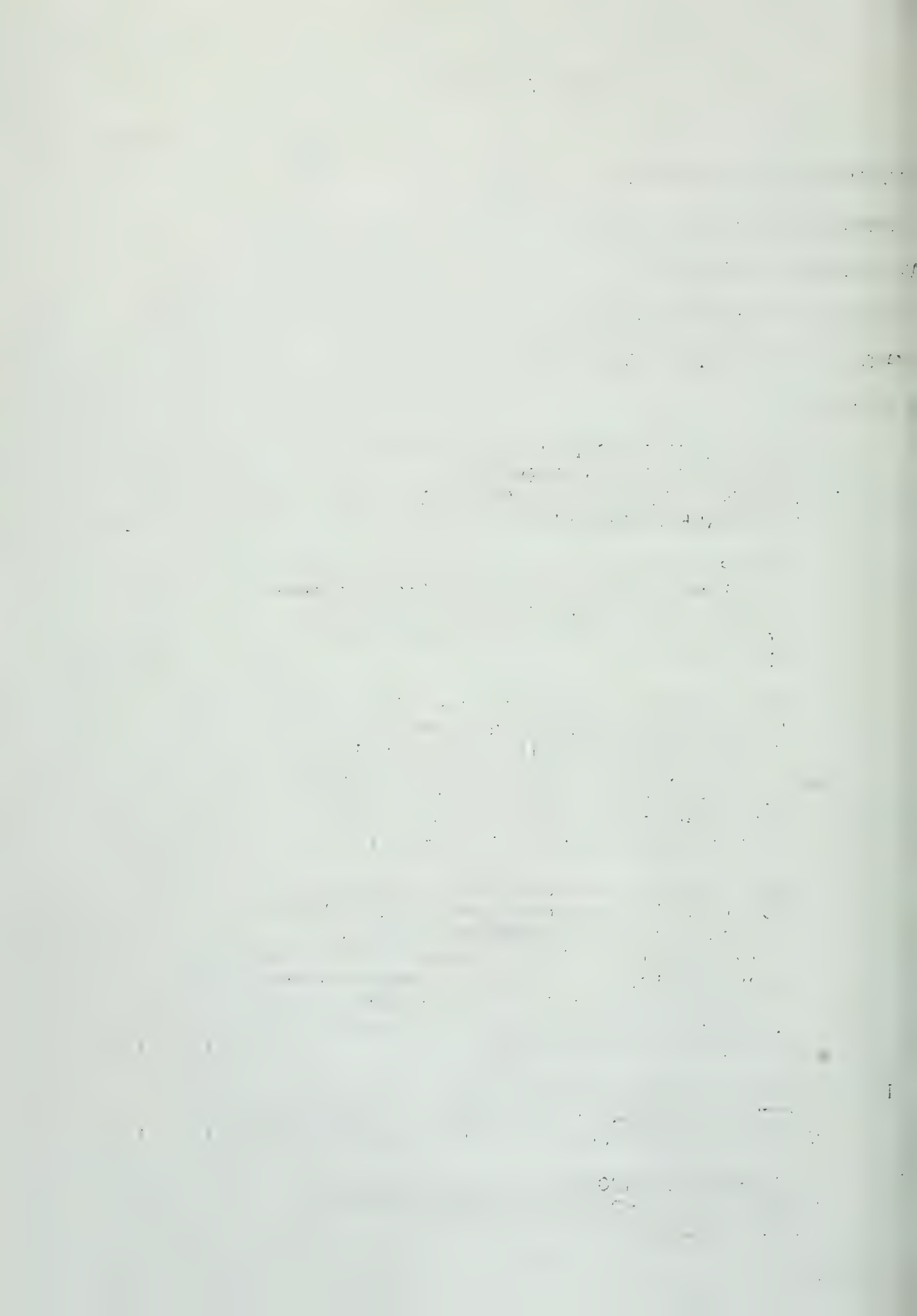
WM. B. LUCK

THOMAS C. LYNCH, Attorney General
WILLIAM E. JAMES,
Assistant Attorney General
ROBERT F. KATZ,
Deputy Attorney General
600 State Building
Los Angeles, California 90012

Attorneys for Appellee

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH JAMES WELLS,)	
)	
Appellant,)	NO. 22745
)	
v.)	
)	APPELLEE'S BRIEF
WALTER CRAVEN, Warden,)	
)	
Appellee.)	

JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain a petition for a writ of habeas corpus by a state prisoner. 28 U.S.C. § 2241(a)(c)(3). Such a petition was filed by appellant on January 23, 1968, in the United States District Court in San Francisco. (Cl. Tr. p. 2.)

This court has jurisdiction to review on appeal a final order of a district judge denying a writ when a certificate of probable cause has been issued. 28 U.S.C. § 2253. An order denying appellant's petition for a writ of habeas corpus was filed on February 8, 1968, and entered on February 12, 1968. (Cl. Tr. p. 40.) An order granting a certificate of probable cause and granting appellant permission to proceed in forma pauperis was issued by the court below on February 26, 1968. (Cl. Tr. p. 84.)

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STATEMENT OF THE CASE

In 1948 appellant was charged with violation of section 288 of the California Penal Code for misconduct with a five year old girl. A preliminary hearing was held on June 25, 1948. (Cl. Tr. p. 18.) On July 13, 1948, appellant entered a plea of not guilty and not guilty by reason of insanity. (Cl. Tr. p. 50.) On August 25, 1945, with appellant present, by stipulation of his counsel, his plea was changed to guilty and a prior felony conviction for burglary and grand theft, for which he served a term of imprisonment, was admitted. (Cl. Tr. p. 51.) Criminal proceedings were suspended and appellant was adjudged to be a sexual psychopath and committed to a state hospital. After a year and a half in the hospital, appellant was granted probation. In 1951, by reason of his misconduct with two small girls, probation was revoked and petitioner was sentenced to state prison. His appeal from this judgment on the ground that he should have had another psychiatric hearing when probation was revoked pursuant to section 5501(c) of the California Welfare and Institutions Code was unsuccessful. In re Wells, 67 A.C. 901, 434 P.2d 613, 64 Cal. Rptr. 317 (1967); People v. Wells, 112 Cal. App. 2d 672, 246 P.2d 1023 (1952).

Appellant was paroled in 1960. In November 1960 he pleaded guilty to child molestation (Cal. Pen. Code § 647a), his parole was revoked, and he was sentenced to state prison, the term to run concurrently with the unexpired portion of the prior conviction. No appeal was taken. A

later collateral attack on the 1948 conviction through state habeas corpus proceedings failed. In re Wells, supra.

STATEMENT OF FACTS

(There was no evidentiary hearing below. The facts herein referred to are supplied by allegations in the petition, various documents in the state court records in cases involving the appellant, and opinions of the California Appellate and Supreme Courts.)

APPELLANT'S CONTENTIONS

The Appellant's Opening Brief contains a number of contentions and arguments which, it is hoped, may fairly be summarized as follows:

1. Errors relating to the June 25, 1948 preliminary hearing
 - a. The appellant was entitled to the assistance of counsel at the preliminary hearing since it was a "critical stage."
 - (1) Counsel-assisted cross-examination at the preliminary hearing was necessary to attack inaccurate prosecution testimony given by a hostile witness.
 - (2) Counsel-assisted cross-examination was necessary to show that a misdemeanor, and not a felony, was committed.

(3) Appellant remains incarcerated, 20 years later, as a result of the testimony presented at the preliminary hearing.

- b. The appellant's right to counsel and his right to confront witnesses against him were abridged regardless of whether the preliminary hearing was a "critical stage."
- c. The failure of the appellant to be advised of his rights and to be supplied with counsel violated the California Constitution and therefore violated due process of law.

2. The August 25, 1946 proceeding

- a. Due process was violated because appellant never personally and knowingly pleaded guilty to violation of section 288 of the California Penal Code.

(1) The state should be held responsible for failing to provide a transcript which would show this fact since appellant requested the preparation of such a transcript in a motion to augment the record in his 1952 appeal.

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- b. The stipulated plea of guilty violated appellant's right to jury trial and violated section 1018 of the California Penal Code.
 - c. Appellant's representation by counsel was inadequate.
3. The November 1960 proceeding
- a. The failure of the trial court to order a new psychiatric hearing as required by section 5501(c) of the California Welfare and Institutions Code meant it acted in excess of its jurisdiction and in violation of due process.

SUMMARY OF APPELLEE'S POSITION

The appellee controverts the foregoing contentions.

ARGUMENT

I

THERE WERE NO ERRORS COMMITTED IN
CONNECTION WITH THE JUNE 25, 1948
PRELIMINARY HEARING WHICH WARRANT
FEDERAL HABEAS CORPUS RELIEF

- A. The Preliminary Hearing Was Not a Critical Stage in the Criminal Process and Appellant Was Not, Therefore, Deprived of His Right to Counsel Therein

Appellant contends that in his case the preliminary hearing was a critical stage in the criminal proceedings against him because he was not given the right of personal or counsel-assisted cross-examination, which was necessary to

attack inaccurate testimony given by a hostile witness and to show that only a misdemeanor rather than a felony was committed, and because he remains incarcerated, almost 20 years later, as a result of unchallenged testimony presented at the preliminary hearing. (App. Op. Br. pp. 3-4; Cl. Tr. p. 18.)

Even accepting his version of the facts, federal habeas corpus relief is not warranted.

". . . California's preliminary examination is not, in and of itself, a critical stage in the judicial proceedings such as to constitutionally require the appointment of counsel. An unrepresented accused cannot plead guilty at such an examination and no incriminating statements made by him at such time can be used against him at a subsequent trial. No defenses which might be asserted at a subsequent trial can be lost at a preliminary examination. 'The test is whether that proceeding and what occurred thereat may adversely and prejudicially affect his defense to the charge in a subsequent trial.'" Wilson v. Harris, 351 F.2d 840, 844 (9th Cir. 1965), cert. denied, 383 U.S. 951 (1966).

Appellant's June 25, 1948 preliminary hearing was not a critical stage within the above definition. He does not allege that, had he so desired, he could not have used cross-examination and the assistance of appointed counsel

to challenge prosecution witnesses or show the alleged true nature of the crime committed at a later stage. The superior court record shows that he instead entered a plea of guilty at his trial of August 25, 1948.^{1/} (Cl. Tr. p. 51.)

His subsequent incarceration would appear, therefore, to be the result of appellant's decision to admit his crime rather than to anything inevitably following from the preliminary hearing. It is appellant's burden, in order to establish that the preliminary hearing was a critical stage, to show that either there was a likelihood of later prejudice due to the failure to appoint counsel or that actual prejudice resulted therefrom. Wilson v. Harris, 351 F.2d 840, 844-45 (9th Cir. 1965), cert. denied, 383 U.S. 951 (1966); see also Chester v. California, 355 F.2d 778, 780 (9th Cir. 1966). At any rate, any defects in the preliminary hearing were waived by appellant's subsequent guilty plea. Resor v. Rodriguez, 373 F.2d 20, 22 (10th Cir. 1967).

B. The Asserted Denial of the Right to Cross-Examination and Denial of Counsel at the Preliminary Hearing Did Not Violate Appellant's Rights Because Such Asserted Errors Were Not Necessarily Harmful to Him or Contributory Toward His Conviction

Based on his interpretation of the language in the sixth amendment, the appellant contends that the right to counsel and right of confrontation apply in "all criminal prosecutions," that preliminary hearings are "criminal

1. Issues relating to this plea and proceeding will be discussed in Part II, pages 13-17, of Appellee's argument, infra.

prosecutions," and that therefore he was entitled to these rights at his preliminary hearing whether or not it was a critical stage. (App. Op. Br. p. 4.)

The sixth amendment's right to counsel, as applied to the states through the due process clause of the fourteenth amendment, has been held by the Supreme Court to apply to the "critical stage" of criminal proceedings. White v. Maryland, 373 U.S. 59, 60 (1963); Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961). Parts of state criminal processes of merely a preliminary, formal, or nonbinding character clearly appear to have been viewed by both federal and state courts to be sufficiently detached from potentially conviction-pronouncing or sentence-imposing proceedings so as not to come within the traditional coverage of "criminal prosecutions" within the meaning of the sixth amendment. See, e.g., Chester v. California, 355 F.2d 778, 780 (9th Cir. 1966); United States v. Fay, 231 F. Supp. 387, 389 (S.D.N.Y. 1964); In re Van Brunt, 242 Cal. App. 2d 96, 103, 51 Cal. Rptr. 136, 141 (1966), disapproved on other grounds, In re Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967).

While the courts have not appeared to approach the problem of the maturation of the right of confrontation and cross-examination in terms of a critical stage analysis, a reading of the leading Supreme Court decisions on state-denied confrontation has led appellant to submit that a similar approach is called for. In Pointer v. Texas, 380 U.S. 400 (1965), testimony given by a prosecution witness

at the preliminary hearing, where lack of counsel effectively deprived the defendant of the opportunity for cross-examination, was admitted at the subsequent trial under the former testimony exception to the hearsay rule when the witness proved to be unavailable. This was held to violate the right of confrontation. Douglas v. Alabama, 380 U.S. 415 (1965), involved the reading in the presence of the jury, under the guise of cross-examination of petitioner's alleged accomplice, of a purported confession of the latter which implicated petitioner. The accomplice continually asserted the privilege against self-incrimination and thus denied petitioner an opportunity for cross-examination. In Barber v. Page, 36 U.S.L.W. 4329 (U.S. Apr. 23, 1968), the use at a trial of testimony given in the preliminary hearing was held to violate the right of confrontation since Oklahoma made no attempt to obtain the presence of the witness, who was incarcerated in a federal prison in Texas.

The common denominator and, it is submitted, key factor, in all three decisions was the actual use of potentially damaging evidence against a defendant, which evidence might have been rendered less harmful or have been negated had the defendant been given the opportunity for effective cross-examination of the declarant. That key factor is absent here. There is no indication that any testimony given at the preliminary hearing was used against the appellant at his trial. Instead of causing the prosecution to call its witnesses and present its case on August 25, 1948, at which

time petitioner had the services of court-appointed counsel to conduct cross-examination, petitioner instead chose to enter a plea of guilty. No testimony given at the preliminary hearing was introduced against him. (Cl. Tr. p. 51.) There is, therefore, a complete lack of any showing that the asserted lack of opportunity to cross-examine at the preliminary hearing caused or contributed to the judgment of conviction.

c. The Asserted Failure of the Minicipal Court to Advise Appellant of His Right to Counsel Or to Appoint Counsel, Allegedly in Violation of the California Constitution, Does Not Warrant Federal Habeas Corpus Relief, Especially Since Appellant Deliberately Bypassed His State Remedy Therefor

Appellant contends that sections 8 and 13 of article I of the California Constitution were not followed when he was not advised of his right to counsel and no counsel was appointed for him at the preliminary hearing, and that this violation of state law itself constituted a violation of due process. (App. Op. Br. pp. 4-5; Cl. Tr. p. 18.)

It should first be noted that if the proposition were accepted that a state violates the due process clause of the fourteenth amendment whenever it incarcerates a person following a conviction obtained in criminal proceedings which contained violations of the state's own law, almost every state appeal would involve a federal question. It seems clear that such a result and its consequent burden on the federal court system was never intended by Congress or the courts. Only if such errors are shown to be "so conspicuously prejudicial as to deprive the defendant of a fair trial" is

federal habeas corpus relief available. United States v. Maroney, 373 F.2d 908, 910 (3rd Cir. 1967); see Peasley v. Pitchess, 358 F.2d 706, 707 (9th Cir. 1966); Reid v. Bannon, 234 F.2d 654 (6th Cir. 1956); United States v. Wolfe, 232 F. Supp. 85, 97 (S.D.N.Y. 1964); Johnson v. Crouse, 224 F. Supp. 864, 867 (D. Kan.), aff'd., 332 F.2d 417 (10th Cir.), cert. denied, 379 U.S. 866 (1964). Since the appellant did have counsel at the time and place set for trial (Cl. Tr. p. 51), any errors with respect to appointment of or advisement as to the right to counsel at the preliminary hearing, especially in light of appellant's guilty plea, not only were not serious enough to deprive him of a fair trial but should be considered inconsequential.

A second compelling reason for denying relief is that appellant deliberately bypassed an adequate and easily invoked state remedy for the alleged errors at the preliminary hearing. Under sections 995 and 996 of the California Penal Code, appellant's proper course of action was a motion to set aside the information. Although represented by counsel, appellant failed to pursue this remedy and thus waived his right to question the legality of his commitment under state law. In re Wells, 67 A.C. 901, 903, 434 P.2d 613, 614-15, 64 Cal. Rptr. 317, 318-19 (1967).

Counsel's decision to bypass established state remedies, even if there was no prior consultation with the defendant, when done as part of trial tactics or strategy, precludes the defendant from asserting constitutional claims based on possible damage resulting from such a

decision. Nelson v. California, 346 F.2d 73, 80-81 (9th Cir.) [interpreting Henry v. Mississippi, 379 U.S. 443 (1965), and Fay v. Noia, 372 U.S. 391 (1963)], cert. denied, 382 U.S. 964 (1965). This was clearly such a strategic or tactical decision by counsel. A successful motion under section 995 of the California Penal Code would not bar further prosecution or a new preliminary hearing. In re Van Brunt, 242 Cal. App. 2d 96, 108, 51 Cal. Rptr. 136, 144 (1966), disapproved on other grounds, In re Smiley, 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967). Further proceedings following a successful motion might have seemed to counsel likely to produce more damaging evidence against appellant, possibly leading to conviction of more than one offense or leading to little chance of leniency. Choosing instead to enter a plea of guilty would also have the potential advantage of securing to counsel's indigent client psychiatric examination within the shortest possible time. The California procedure in question, as the state's highest court stated in People v. Harris, 67 A.C. 893, 898 & n.3, 434 P.2d 609, 611-12 & n.3, 64 Cal. Rptr. 313, 315-16 & n.3 (1967), serves a legitimate state interest in the administration of justice, and thus the failure to pursue it constitutes an intentional bypass or waiver within the meaning of Henry v. Mississippi, 379 U.S. 443, 448-452 (1965).

The opinion of the Federal District Court shows that it considered the state court records, including those most relevant to the entering of the guilty plea (Cl. Tr. p. 6), and that therefore its ruling that

counsel's decision did not violate appellant's constitutional rights was an independent determination. See, e.g., Lessard v. Dickson, ___ F.2d ___, (9th Cir., Apr. 17, 1968); Nelson v. California, 346 F.2d 73, 77 (9th Cir.), cert. denied, 382 U.S. 964 (1965).

II

NO DEPRIVATIONS OF APPELLANT'S RIGHTS WARRANTING FEDERAL HABEAS CORPUS RELIEF OCCURRED AT THE AUGUST 25, 1948 PROCEEDING

Appellant argues that he never personally and knowingly pleaded guilty to violation of section 288 of the California Penal Code, that the guilty plea entered by his counsel violated both his right to jury trial and section 1018 of the California Penal Code, and that his representation by counsel was inadequate. He urges that "the State should be held responsible" for failure to produce a reporter's transcript of the August 25 proceedings. (App. Op. Br. pp. 5-6; Cl. Tr. pp. 12-13, 16-17.)

Despite the diligent efforts of appellee's attorneys, no transcript of the August 25, 1948 proceedings could be obtained. (Cl. Tr. pp. 69-71.) The main cause for this undoubtedly is the passage of time between the plea and the pursuance of post-conviction relief. Appellant claims that a request to augment the record with "all necessary documents and papers" was denied during his 1952 appeal. (App. Op. Br. pp. 5-6.) This contention is not correct. The documents forwarded by appellee to the Federal District Court include a request to the state appellate court for augmentation of

the record (a copy of which is attached as an appendix hereto). The motion requested inclusion in the record of a probation officer's report and the report of Dr. Hyman Tucker. As a reason for the motion, the last paragraph stated that "all necessary papers and documents" be before the court. No mention whatsoever was made of a transcript of the August 25, 1948 proceedings.

The situation here (a 19-year delay) lends strong support to the proposition that permitting unlitigated constitutional questions to lie dormant for years and then be litigated through a habeas corpus petition "does not further the administration of justice." Earley v. United States, 263 F. Supp. 522, 527 (C.D. Cal. 1966), aff'd, 381 F.2d 715 (9th Cir. 1967). As has been held where a federal offense was involved, one who delays so long after the trial court proceedings to attack his guilty plea "must carry a heavy burden to overcome the regularity of his conviction." Pasley v. Overholser, 282 F.2d 494, 495 (D.C. Cir. 1960). The inadequately explained failure to raise this issue for 19 years would, it is submitted, be a basis for concluding that petitioner has deliberately bypassed, abandoned, and waived the point. While the "injury" done to him may not grow stale, the ability to decide what happened does, as does the ability to retry the case, so that some slight degree of compulsion^{2/} to raise his claims in a timely way is warranted.

2. The lack of an adequate explanation for the 19 year delay serves to distinguish and render inapplicable hereto decisions allowing habeas corpus relief despite long delays. In Fay v. Noia, 372 U.S. 391, 439-40 (1963), the petitioner

was held that where an accused had the services of counsel at trial and presumably for appeal, yet failed to pursue an appeal, and where due to the death of the court reporter no trial transcript was available, the state, in applying the requirement of supplying transcripts to indigent appellants, may deny relief without violating due process or equal protection. In the instant case, since the lack of a transcript is not due to fault of the state and since appellant also had counsel, the state also should be allowed to deny relief though a transcript may be important to a proper determination of the issues raised. The available records, the minutes of the superior court, show that appellant withdrew his previous plea of not guilty and not guilty by reason of insanity and "regularly enters [entered]" a plea of guilty. (Cl. Tr. p. 51.) There is no indication that the court acted

2. (Cont'd)

did not appeal his conviction in 1942 because under existing state law he was faced with a "grisly choice" -- if his appeal proved successful, a new trial could result in the death penalty. The petitioner in Palmer v. Ashe, 342 U.S. 134 (1951), had at one time been committed to a state hospital because he was an "Imbecile"; he alleged that he had never received advice as to or the assistance of counsel, and that the prosecution had deceived him as to the nature of the crime to which he pleaded guilty. In Uveges v. Pennsylvania, 335 U.S. 437 (1948), there was an alleged lack of assistance of, and advice as to, counsel between the arrest and the conviction, and a charge that the petitioner's guilty plea had been coerced through threats made by the prosecutor. Herman v. Claudy, 350 U.S. 116 (1956), also involved the issue of total lack of counsel and of advice pertaining to the right to counsel. No such explanations for delay appear in the instant case. Appellant had the services of counsel when he entered his guilty plea. (Cl. Tr. p. 51.) Appellant was represented by counsel in subsequent judicial proceedings in September of 1948, May of 1950, and January of 1952; at no time was the issue of his allegedly nonpersonal and unknowing guilty plea raised. (Cl. Tr. pp. 52, 53, 65-68.)

contrary to state law (Cal. Pen. Code §§ 859, 1012) by failing to take a personal plea after advising appellant of his rights and the consequences of his actions.

Even if it is assumed hypothetically that appellant did not personally plead guilty and that this violated state law (Cal. Pen. Code § 1018), federal habeas corpus relief would not be warranted unless this asserted error constituted a denial of fundamental fairness. See, e.g., Lisenba v. California, 314 U.S. 219, 236 (1941). Such is not the case. Appellant does not contend that he objected to the entering of the plea. By acquiescing (he does not contend he was not present at the time), he authorized and adopted counsel's action. In re Martinez, 52 Cal. 2d 808, 815, 345 P.2d 449, 453 (1959). Appellant must have known that he was charged with and had pleaded guilty to violation of section 288 of the Penal Code when he was committed to the Mendocino Hospital on September 15, 1948. (Cl. Tr. p. 52.) In May of 1950, with appellant's new counsel present, probation was granted. (Cl. Tr. p. 53.) On January 8, 1952, with appellant and counsel, Mrs. Gladys T. Root, present, appellant was again sentenced for violation of section 288. (Cl. Tr. pp. 65-68.) The court stated that appellant had previously withdrawn a not guilty plea and pleaded guilty to violating section 288. (Cl. Tr. p. 67.) Neither appellant personally nor his counsel raised the issue of the alleged improper guilty plea at this or any other of the above mentioned proceedings.

Nor was his present contention of inadequacy of counsel raised. Asserted inadequacy of counsel does not

present a question warranting federal court relief unless "the service of counsel was of such a caliber as to amount to a farce or a mockery of justice." Grove v. Wilson, 368 F.2d 414, 416 (9th Cir. 1966). As shown in Part I,c, supra, appellant's counsel on August 25, 1948, may have been motivated by valid strategic considerations. "The right to assistance of counsel does not require successful assistance." Nelson v. California, 346 F.2d 73, 81 n. 8 (9th Cir.), cert. denied, 382 U.S. 964 (1965). The August 25 proceeding was in Los Angeles County where appellant was represented by a deputy public defender, whose office has traditionally enjoyed a highly favorable reputation. See, e.g., Wilson v. Gray, 345 F.2d 282, 288 n. 8 (9th Cir. 1965), cert. denied, 382 U.S. 919 (1965); People v. Adamson, 34 Cal. 2d 320, 333, 210 P.2d 13, 19 (1949).

III

THERE WERE NO ERRORS RELATED TO THE NOVEMBER 1960 PROCEEDINGS WARRANTING FEDERAL HABEAS CORPUS RELIEF

Appellant contends that the November 1960 proceeding, involving a violation of section 647a of the California Penal Code, denied him due process of law in that the court acted in excess of its jurisdiction by not following the mandate of section 5501(c) of the California Welfare and Institutions Code and suspending criminal proceedings and ordering a hearing and examination to determine whether appellant was a mentally disordered sex offender.^{3/} (App. Op. Br. pp. 6-7; Cl. Tr. pp. 4-5, 15.)

3. Appellant does not appear to contend that there is a

Upon his 1960 conviction, petitioner was sentenced to state prison, the term to run concurrently with that of his prior conviction. His parole from his 1952 commitment was also revoked. In re Wells, 67 A.C. 901, 902, 434 P.2d 613, 614, 64 Cal. Rptr. 317, 318 (1967). This is highly significant in that since such action by the California Adult Authority takes precedence over orders of commitment pursuant to the Welfare and Institutions Code, appellant would be properly returned to prison even if a sexual psychopathy hearing had taken place and regardless of the result thereof. People v. Ballin, 66 Cal. 2d 80, 82, 424 P.2d 333, 334, 56 Cal. Rptr. 893, 894 (1967); People v. Redford, 194 Cal. App. 2d 200, 204-06, 14 Cal. Rptr. 866, 867 (1961); cf. People v. Rummel, 64 Cal. 2d 515, 518, 413 P.2d 673, 675, 50 Cal. Rptr. 785, 787 (1966); People v. Victor, 62 Cal. 2d 280, 294-95, 398 P.2d 391, 400-01, 42 Cal. Rptr. 199, 208-09 (1965). Thus, even if appellant's contention that the lack of sexual psychopathy proceedings invalidated the 1960 sentence were correct, his request for a complete release from custody (Cl. Tr. p. 15) is not well taken since he would still be subject to serve the remainder of his 1948 sentence due to his commission of the criminal act which caused both the revocation of his parole and the instituting of the criminal prosecution.

3. (Cont'd)

federal constitutional right to commitment as a sexual psychopath rather than to incarceration as a sex offender, and appellee can find no authority establishing such a proposition. Appellant's argument seems rather merely to be a manifestation of the belief that whenever a state violates the letter of its own law it also violates due process.

However, even if the 1960 sentence were the only one he was serving, a failure to follow the statute [Cal. Welf. & Inst. Code § 5501(c)], even if such a violation of state law was itself a violation of the fourteenth amendment, would entitle appellant only to return to the superior court for the ordering of a hearing and examination, and not to discharge from state custody. While there appear to be no federal decisions directly in point, the validity of the foregoing proposition would seem established in light of the closely analogous rule that excessive sentences should be corrected "by appropriate amendment of the invalid sentence by the court of original jurisdiction" and "not by absolute discharge of the prisoner." Bozza v. United States, 330 U.S. 160, 166 (1947); accord, McKinney v. Finletter, 205 F.2d 761, 763 (10th Cir. 1953); Ruben v. Welch, 159 F.2d 493, 494 (4th Cir. 1947), cert. denied, 331 U.S. 814 (1947); McKee v. Johnston, 109 F.2d 273, 276 (9th Cir. 1939), cert. denied, 309 U.S. 664 (1939).

One issue appears to remain -- whether this court should rule that appellant be remanded to the superior court in order that a sexual psychopathy hearing and examination might be had.^{4/} However, appellant's request for absolute

4. In light of Carafas v. LaVallee, 36 U.S.L.W. 4409 (U.S. May 20, 1968), appellee is of the view that the fact state custody of appellant is adequately based on the revocation of his 1952 parole does not prevent federal court determination of the merits of his attack on the 1960 conviction. Appellee's position, rather, is that even if the 1960 conviction were considered invalid, appellant, because of the continued validity of the parole revocation, would not be entitled to be released from state custody.

discharge before the California Supreme Court led to its failure to reach the issues of whether such proceedings would be statutorily or constitutionally in order. In re Wells, 67 A.C. 901, 903-04, 434 P.2d 613, 615, 64 Cal. Rptr. 317, 318 (1967). Appellant is apparently seeking to avoid both criminal punishment and the civil commitment, while the California Supreme Court's apparent position was that at most he would be entitled to consideration for commitment as a sexual psychopath. If he really desires the sexual psychopath commitment he should make this request to the state courts. Consideration by this court is thus prevented by appellant's failure to exhaust available state remedies by seeking a determination of the issue in the state courts. 28 U.S.C. § 2254; see Fay v. Noia, 372 U.S. 391, 419-20 (1963); Brown v. Allen, 344 U.S. 443, 487 (1953).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order denying the motion for a writ of habeas corpus be affirmed.

Respectfully submitted,

THOMAS C. LYNCH, Attorney General
WILLIAM E. JAMES,
Assistant Attorney General
ROBERT F. KATZ,
Deputy Attorney General

By ROBERT F. KATZ
ROBERT F. KATZ,
Deputy Attorney General

RFK:lk;cg
6/6/68

Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the Rules of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT F. KATZ

ROBERT F. KATZ

Deputy Attorney General

A P P E N D I X

1 IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
2 SECOND APPELLATE DISTRICT
3 DIVISION ONE

4 THE PEOPLE OF THE STATE OF CALIFORNIA,)

5 Plaintiff and Respondent,

Crin. No. 4800

6 vs.

7 KENNETH JAMES WILLS,

8 Defendant and Appellant.
9

10 REQUEST FOR ADJUDICATION OF RECORD

11 Pursuant to Rule 12(a) of Rules on Appeal, it is hereby
12 suggested to the reviewing court that the record in the
13 above entitled cause be augmented by ordering the trans-
14 mitted to it of a copy of the report of a probation officer
15 dealing with the violation of probation, as well as a copy
16 of the report of Dr. Hyman Tucker appointed on December 14,
17 1951, in Superior Court case, Los Angeles No. 120658.

18 Appellant believes that the inclusion of these reports
19 in the record is necessary for a determination of the cause
20 on appeal for the following reason:

21 It is the contention of appellant that the trial court
22 erred in refusing to proceed with the hearing on sexual
23 psychopathy. At that time the court had before it the
24 report of the probation officer with respect to the alleged
25 violation of probation. In that report there was contained
26 the statement of Dr. Douglas H. Kelley, a police psychiatrist

connected with the Berkeley Police Department and with
respect to which a stipulation was entered into in the trial
court; also, the trial court in ordering a hearing in criminal
psychopathy ordered Dr. Hyman Tucker to make an examination
and to report back to the court his findings. Although
from the record it appears that report was before the trial
court there is no indication in the record as to the actual
findings ~~made~~ ^{STATED THEN} than his conclusion that the appellant was a
criminal psychopath. The appellant believes that in review-
ing this matter that all necessary papers and documents
should be before this honorable court, and in particular,
these two documents referred to above.

Dated this 19th day of May, 1952.

Respectfully submitted,

CLAYTON THOMAS ROOT and
IRVING W. GROSSMAN

By Irving W. Grossman
Attorneys for Appellant

By the Court:

IT IS SO ORDERED.

Dated this _____ day of May, 1952.

Presiding Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

GOODMAN LUMBER COMPANY, Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

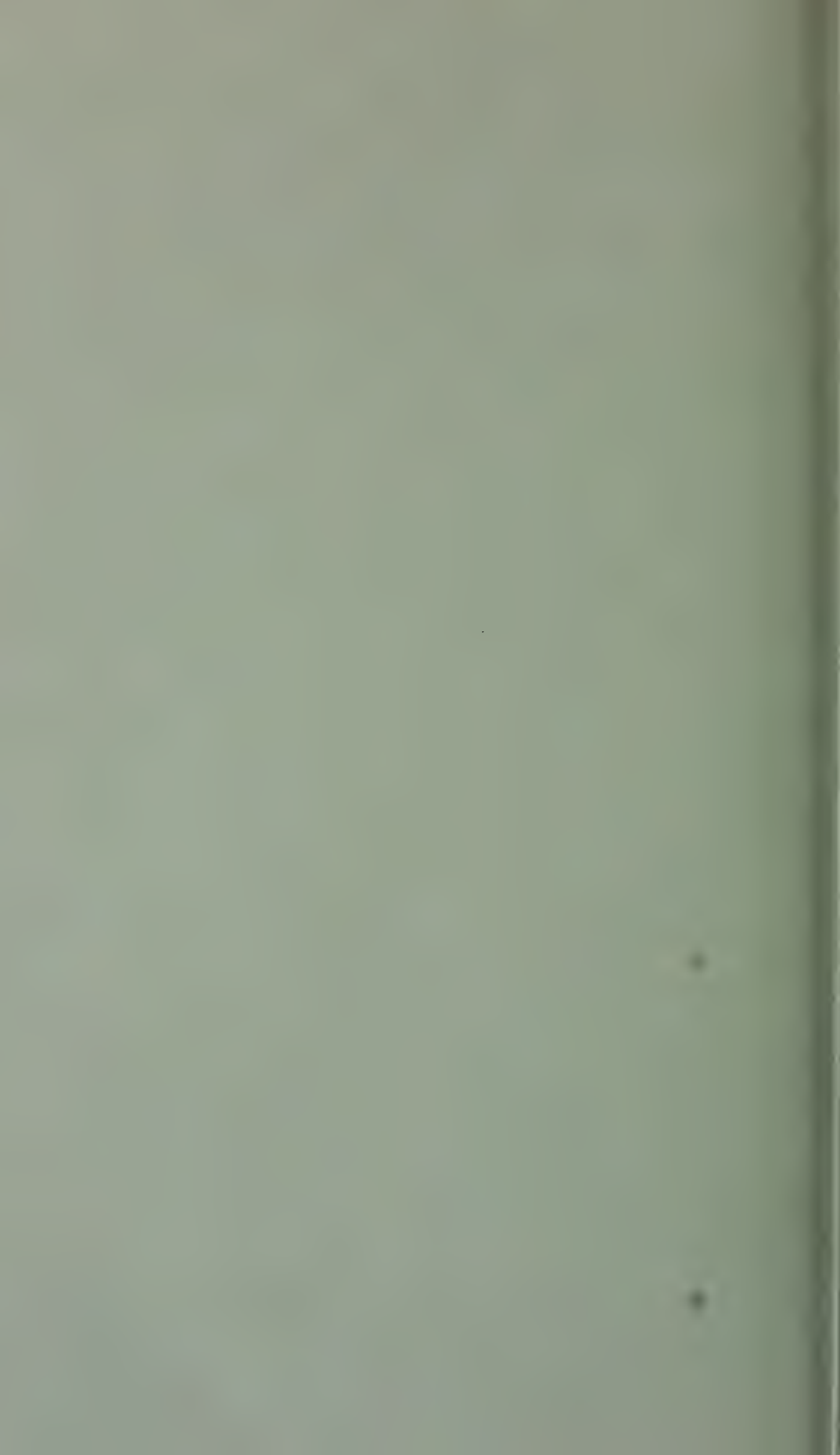
WARREN M. DAVISON,
ABIGAIL COOLEY BASKIR,
Attorneys,

National Labor Relations Board.

FILED

JUN 19 1968

WM. B. LUCK, CLERK



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,746

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

GOODMAN LUMBER COMPANY, Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order (R. 44-49)¹ issued against respondent (hereafter "the Company") on June 29, 1967, and reported at 166 NLRB No. 48. The

¹The original papers in the case have been reproduced and transmitted to the Court pursuant to Rule 10(2). "R." refers to the formal documents, bound as "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of testimony at the unfair labor practice hearing. References designated "GCX" and "RX" are to the General Counsel's exhibits and respondent's exhibits, respectively. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

unfair labor practices occurred at San Francisco, California, where the Company is engaged in the business of selling lumber, hardware and plumbing supplies. The Court has jurisdiction of the proceedings under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).²

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by promising employee Freeman Parker, Jr. monetary benefits if he would revoke his union authorization card, and by threatening employee Freeman Parker, Sr. with reprisals if he did not convince his son to revoke his authorization card. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Roger Ruiz, by constructively discharging employee Parker, Jr., and by laying off employee Burwell, because of their union activities. The evidence upon which the Board based its findings is summarized below.

A. Background

In late October 1965,³ employee Roger Ruiz, after discussing the possibility of union representation with some fellow employees, contacted the Union's^{3a} secretary-treasurer, George Pedrin (Tr. 26, 182-183). Ruiz himself signed

²The pertinent provisions of the Act are printed as Appendix A to this brief, *infra* pp. 25-26.

³Unless otherwise noted, all events herein occurred in 1965.

^{3a}International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 12.

an authorization card on November 19, and throughout the next two weeks persuaded five other employees to sign cards also (R. 17; Tr. 184-186).⁴

On December 1, the Union informed the Company by letter that it represented a majority of the Company's "warehousemen", and requested recognition as their collective bargaining agent (R. 17; Tr. 58-59). That same day, union representative Pedrin called on the Company's general manager, Murray Gelleri, and handed him a copy of the letter requesting recognition (R. 17; Tr. 59-62). After reading the letter, Gelleri demanded proof of the Union's majority status, and Pedrin handed him the signed authorization cards (R. 17; Tr. 62). Gelleri examined them, listed the signers' names on a piece of scratch paper, and agreed to meet with Pedrin on December 10 (R. 18; Tr. 62-64, 269).⁵

⁴Freeman Parker, Jr., Thomas H. Irving and Carbbby Lee Burwell signed cards on November 19 (GCX 3, 4, 5); Joseph Pohl signed one on November 29 (GCX 7); and Julia Myers signed one on December 1 (GCX 2).

⁵The parties met on December 10, at which time the Union presented copies of a proposed contract to the Company (R. 17; Tr. 66). The Union also protested the discharge of employee Roger Ruiz, which had occurred the previous day (see discussion *infra*, pp. 5-7).

The parties met again on December 14, and the Union asked about the proposed contract (R. 17; Tr. 68). Gelleri responded, however, that he did not recognize the Union, and that the meeting was not a collective bargaining meeting (*ibid.*).

The Union subsequently filed charges against the Company, alleging that it had refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act; at the hearing in the instant case, the Company entered into a settlement agreement with the Union and the Board regarding the 8(a)(5) and (1) charge, under which the Company agreed to bargain with the Union, and the pertinent allegations of the Complaint were withdrawn (R. 16; Tr. 48-54).

B. The Company interrogates its employees regarding their union activities

After the Union's demand for recognition, Gelleri, armed with his list of card signers, questioned all except one of those signers about their union membership. The very day of the demand, he separately sought out employees Freeman Parker, Jr. and Roger Ruiz, and asked each if he had signed an authorization card (R. 18-19; Tr. 147-148, 187). Receiving affirmative responses from both, he asked Parker what the Union had offered as an inducement, and Parker responded "benefits and other things" (R. 18-19; Tr. 148-149). Ruiz was asked "what sort of deal" the Union had offered (R. 19; Tr. 187). He responded "no such deal", but Gelleri pressed further, asking "what kind of pay did they promise" (*ibid.*). Ruiz answered that Gelleri "would have to discuss this in negotiations with the Union" (*ibid.*).

Parker, Jr. was also approached by President Goodman, who asked him to leave his work and "come down for a moment, he wanted to speak with [him]" (R. 19; Tr. 148-149). Parker followed Goodman out to his car, where Goodman asked if he had signed an authorization card (R. 19; Tr. 149). Parker admitted that he had, and Goodman pursued: "[Do you] plan on getting out of the Union?" (*ibid.*). Parker, Jr. said he didn't know, but Goodman warned, "Well, I think you will." (R. 19; Tr. 149).⁶

A few days after the Union's demand, Gelleri summoned employee Julia Myers to his office, and asked if the "Goodman benefits" had been explained to her (R. 17; Tr. 79). She said "Yes"; Gelleri asked her if she had signed an authorization card, and she replied that she had (*ibid.*).

On December 6, Gelleri and President Goodman summoned employee Thomas Irving into the office (R. 18; Tr. 82-83). Gelleri asked Irving if he "knew any of the benefits

⁶The subsequent efforts to carry out this ominous warning are discussed *infra*, pp. 7-10.

of Goodman” (*ibid.*). Irving said that he did not; Goodman interjected that he “should have known about them” (R. 18; Tr. 83-84). Irving explained, however, that he had been hired for part time work by the President’s son, Charles Goodman, who had not discussed the benefits (*ibid.*). Gelleri then asked Irving if he had signed an authorization card (R. 18; Tr. 83-84). When Irving admitted that he had, Gelleri launched into an explanation of the Company’s benefits, and concluded by asking Irving if he had “changed [his] mind any” (*ibid.*). Irving replied, “No” (R. 18; Tr. 83-84).

Finally, Gelleri asked employee Joseph Pohl if he was familiar with the Company benefits, and whether he had signed an authorization card (R. 19; 270-271).

C. The Company discharges Roger Ruiz

Employee Ruiz was discharged on December 9, under the following circumstances: He was hired by the Company on July 1, 1965, and worked in the “hardware warehouse” at a starting salary of \$105.00 per week until the latter part of October (R. 20; Tr. 178, 193). At that time, he told President Goodman’s son, Charles Goodman, that he had been offered a job with the Forestry Department, and that he thought he would take the position because it offered him a better chance of advancement than the Goodman firm (R. 21; Tr. 191, 194, 201-202). Two days later, he learned that the person who had offered him the job was unauthorized to do so; he informed Goodman of this development, and was assured that it would be “quite all right” for him to remain with the firm (R. 21; Tr. 192).

Almost immediately after this last incident, Ruiz was “put in charge” of warehouses 2 and 4 and given a pay increase of \$5 a week (R. 20; Tr. 178-179, 205-206). His new job was accompanied with the understanding that it “was a stepping stone for further promotions if [he] remained with the firm or there were opportunities now for [him] to advance [himself] with the firm.” (Tr. 205-206). About a week later, on November 8, Gelleri and Charles

Goodman asked Ruiz "how things were going" (R. 22; Tr. 314). Ruiz apologized that the warehouse was "in a very chaotic situation, or . . . in an upheaval," and that he was having difficulty getting "orientated" to his new job, but both Gelleri and Goodman assured him that he was doing a good job, and that his work so far indicated that he would be able to master his new position (R. 22; Tr. 314). Charles Goodman reassured Ruiz again on November 29 that his work was "quite satisfactory," and informed him that at the end of November he would receive a \$5.00 a week pay raise, followed by two more such raises at the end of December and January, respectively (R. 22; Tr. 315). Goodman further promised that after his salary reached \$125.00 per week, Ruiz would be reevaluated every six months, and would be given other raises if his work continued to warrant them (*ibid.*).

As shown *supra*, Ruiz signed a union authorization card on November 19, and was questioned about his union activities by Gelleri immediately after the Union demanded recognition on December 1. On December 3, he was questioned again, this time by Charles Goodman (Tr. 187-188). Goodman asked Ruiz if he were aware of the \$5.00 premium pay that all employees received for working on Sundays, and if he were also aware that he was receiving this pay (Tr. 188). Ruiz responded affirmatively to both questions (*ibid.*). Goodman then asked if Ruiz realized that after January, he would be making \$130.00 per week, including premium pay, and Ruiz again responded affirmatively (*ibid.*).

On December 8, Gelleri telephoned Ruiz at his work station, and told him to report back to the hardware warehouse after lunch (Tr. 188). Ruiz arrived at the hardware warehouse at approximately 1 o'clock, where he found Charles Goodman (*ibid.*). He inquired if Goodman wanted him to report to the hardware warehouse, and Goodman responded that he did (R. 20; Tr. 188-189). Ruiz then asked what he should do with the keys to warehouses 2 and 4 (*ibid.*). Goodman took them, and assured Ruiz that "everything else

would be taken care of” (R. 20; Tr. 189). Ruiz queried whether he would be assigned to the hardware warehouse “very long,” but Goodman demurred, saying that “it was all taken care of, to report back to the hardware warehouse, and [he] was to work there.” (*Ibid.*). On the way out of the hardware warehouse, Ruiz encountered Gelleri, who also told him, upon inquiry, to report to the hardware warehouse in the future (R. 20; Tr. 190). Ruiz asked if this were to be a “permanent change,” but Gelleri only said “not to worry about it, that if he wanted [Ruiz] to know, he would let [him] know.” (R. 20; Tr. 190).

The next afternoon, Gelleri came over to Ruiz at work and informed him that the Company was “letting [him] go” (R. 20; Tr. 190). Ruiz asked the reason, and Gelleri responded that the Company was “overstaffed in the hardware warehouse” (*ibid.*). When Ruiz expressed doubt about this assertion, Gelleri asserted that Ruiz was the last person hired in the hardware warehouse (R. 20; Tr. 190). Ruiz countered that he was not, but Gelleri responded that “that was all right, because [Ruiz] had at one time given them notice that [he] was leaving the firm” (R. 20; Tr. 190-191). Ruiz was thereupon discharged.

D. The Constructive Discharge of Freeman Parker, Jr.

Parker, Jr. was one of the employees who signed an authorization card on November 19, and who was questioned by Gelleri about his union membership on December 1, the day the Union demanded recognition (*supra*, p. 4). President Goodman also spoke to Parker about his union activities, asking if he planned to get out of the Union; when Parker said he didn’t know, Goodman warned ominously, “Well, I think you will.” (*Ibid.*).

On December 1 or 2, Parker, Jr.’s father, who also worked for the Company, was called into the office by President Goodman (R. 45; Tr. 108-109). Goodman explained that he didn’t want any more unions, that he already had one,

and that one was “just about it” (Tr. 110). He added that he had beat another union which had tried to organize the employees, and he would beat this one too (*ibid.*). He then told Parker, Sr. that his son had joined the Union, and asked him if he could get the boy’s card back (R. 45; Tr. 110).⁷ Parker, Sr. said that he thought he could do that, and promised at least to “give him hell” (Tr. 109). He complained that his son had given the Union a \$50 initiation fee, and Goodman immediately offered to reimburse the boy if Parker, Sr. got his card back (*ibid.*).

Between this interview and mid-December, Parker, Jr. was subjected to continual pressure by his father to get out of the Union: Parker, Sr. testified that “I give him hell every day but it’s to no avail, and I would have bet money I could do it, but . . . I couldn’t do a doggoned thing with him. . . .” (R. 45; Tr. 109). And Parker, Jr. testified, “all that time during when the Union was going on, I would go home and argue about trying to get into the Union That’s all I hear of. I hear of that before I hear hello or something. Every day I heard the same stuff. . . . I was being bothered by not getting out of the Union by my father. . . .” (R. 45; Tr. 163, 165, 170-171). Then, in mid-December, supervisor Paul Sant sought out Parker, Sr. and said, “Parker, I want to tell you something. Tell your son to resign.” (R. 25; Tr. 133, 300). Parker, Sr. agreed to convey the message because, he testified, he was “getting tired of the headache” of being “harassed every day” by Mr. Goodman (Tr. 111). That evening, he told his son, “Little brother, Paul [Sant] told me to tell you to resign. . . . They don’t want you down any more. Don’t go back no more because he told me to tell you to resign.” (R. 46; Tr. 141, 112). Parker, Jr.’s

⁷Parker, Sr. was opposed to his son’s union membership, as evidenced by his testimony at the hearing (R. 23; Tr. 137). On one occasion, he told President Goodman that he felt “bad” about his son’s union membership because Goodman had been good to him, and that he would try to get “Sonny” to withdraw his card (R. 23; Tr. 285-286).

mother then announced that she would leave the house if he went back to work (Tr. 164).

Parker, Jr. did not go to work the next day, and Sant inquired of Parker, Sr. where he was (R. 46; Tr. 139). Parker, Sr. explained that his son was at home, and when Sant asked why, continued: "Well, didn't you tell me yesterday to tell him to resign?" (*Ibid.*). Sant responded, "Well, I didn't mean for him to quit." (R. 46; Tr. 139). Parker queried, "What do resign mean, if it doesn't mean quit?" (*Ibid.*). Sant said only, "That's what the bosses told me, Parker" (Tr. 112).

Shortly thereafter, President Goodman asked Parker, Sr. if he had attempted to get his son to come back and "sign a card" (Tr. 114). Parker, Sr. said he would try to get his son to come in, to which Goodman responded, "You either get him down there to sign or else." (Tr. 114). Later, Goodman again asked Parker, Sr. if his son were "coming down to sign," but Parker, Sr. explained that his son had left home and he was not sure where the boy could be located (Tr. 115).⁸ Goodman warned, "If I lay you off a week you will find that boy." (Tr. 115).

Later, Goodman told Parker, Sr. that his son had a pay check coming, and should pick it up (Tr. 138). When Parker,

⁸Parker, Sr. explained at the hearing that his son left home "after I was giving him hell every day", and that the following conversation ensued with his wife (Tr. 136):

Mr. Parker: "Where is little brother?"

Mrs. Parker: "He left."

Mr. Parker: "Why?"

Mrs. Parker: "Well, you're running that boy away from home."

Mr. Parker: "Well, every time I get after him, after him about that Union. . . ."

Mrs. Parker: "You're all the time getting after him about that Union and you gets him all upset. You see, he's not going to sign."

Mr. Parker: "I'm getting tired of getting hell every day myself. I wish to God he never had come there in the first place."

Jr. went to the Company for his check, he was summoned into Gelleri's office and asked if he had "brought anything with [him]" (R. 46; Tr. 138, 150). Parker, Jr. said he had not, and Gelleri asked if he would "sign something" (R. 46; Tr. 151, 153-154). Parker, Jr. "knew" that Gelleri was referring to a withdrawal of his authorization card, and responded that he would not sign anything (R. 46; Tr. 152-154). Goodman then handed him his last paycheck (*ibid.*).

E. The Layoff of Carbbby Lee Burwell

Carbbby Lee Burwell began working for the Company in July, 1965 as a warehouseman (R. 29; Tr. 88). In September, 1965, he was entrusted with some additional, janitorial duties, and was given a pay raise of 25¢ an hour (R. 29; Tr. 88-89). Six weeks later, he was given still another raise of 15¢ an hour (R. 29; Tr. 89-90). Prior to December 1, the Company had never complained about the quality of his work, and on at least one occasion in October, Charles Goodman complimented him on his work, saying that he was "keeping the store something better than the other janitor." (R. 28; Tr. 94-95).

As shown *supra*, Burwell was one of the employees who signed union authorization cards, and whose card was shown to Gelleri on December 1 by the union representatives (*supra*, p. 3). After the union representatives left Gelleri's office that day, supervisor Levy came over to Burwell and said that he "was watching [Burwell] slow down, [that he] wasn't as fast as [he had been] before . . . that [he] should speed up a little more . . . [and that his] work was just unsatisfactory" (R. 29; Tr. 96). Levy then ordered Burwell to perform some additional duties, such as scrubbing the cigarette burns on the floor with steel wool, dusting out the medicine cabinets, unloading boxes, and dusting off the roof (indoor) of the credit department (R. 29; Tr. 96-97). And about a week later, Charles Goodman gave Burwell similar additional jobs to perform (*ibid.*).

On approximately December 26, Levy called Burwell into his office and told him that because business was slow he was being laid off, and that he should return after January 3 (R. 29; Tr. 97-98). Burwell objected that he didn't think business was that slow, but Levy merely said that he had told Burwell to come back after January 3 (*ibid.*).

As soon as Burwell returned on January 4, Levy said to him, "[Is] the floor dirty enough for [you]? . . . It could get a little dirtier." (Tr. 98). Approximately two weeks later, Levy approached Burwell, who was sweeping the main floor of the store, and told him to clean the restroom (R. 29; Tr. 99-100). Burwell complied, but shortly after he started to clean the room, Levy came in and "started to cussing" him about leaving trash on the main floor; he alleged that he knew Burwell had left it there, and told him not to leave trash there any more (R. 29; Tr. 100-101). He then told Burwell to "leave everything as it was and start cleaning the restroom" (*ibid.*). Burwell asked Levy not to curse at him, pointing out that he had never talked to Levy in that manner, and then denied that he was responsible for leaving the trash on the floor (R. 29; Tr. 100-101). Levy asked why Burwell did not quit (R. 29; Tr. 101). Burwell responded that Levy would have to exercise his authority to fire him or lay him off (*ibid.*).

F. The Interrogation of Freeman Parker, Sr.

Finally, a few days before the hearing in this case, Gelleri requested that Parker, Sr. come to his office (R. 30; Tr. 120). On arrival, Parker was introduced by Gelleri to Mr. Levine and Mr. LaVine, Company's counsel in this case (R. 30; Tr. 120-121). Gelleri then left the office, and Levine asked Parker whether Goodman had said any "harsh words" to him (R. 30; Tr. 121-122). Parker told him of one incident, and Levine then asked if Parker had signed an authorization card (*ibid.*). "I signed a card in 1952 with the Union," Parker answered (R. 30; Tr. 121-122). Levine asked which union, and Parker responded, "Local 2559," which, Levine

explained to LaVine, was the "other union" (R. 30; Tr. 121-122).⁹

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board, in agreement with the Trial Examiner, found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by promising employee Freeman Parker, Jr. monetary benefits if he would revoke his union authorization card, and by threatening employee Freeman Parker, Sr. with reprisals if he did not convince his son to revoke his authorization card. The Board further found, in agreement with the Trial Examiner, that the Company discharged employee Roger Ruiz, and laid off employee Carbbby Lee Burwell, because of their union activities, in violation of Section 8(a)(3) and (1) of the Act. Differing with the Trial Examiner, the Board found that the Company's treatment of Freeman Parker, Jr. was motivated by Parker's union activities, and that his eventual departure from the Company as a result of this treatment constituted a constructive discharge in violation of Section 8(a)(3) and (1) of the Act. Finally, the Board concluded, at variance with the Trial Examiner, that the Company counsel's interrogation of employee Freeman Parker, Sr. regarding his union membership constituted a violation of Section 8(a)(1) of the Act.

The Board ordered the Company to cease and desist from the unfair labor practices found. As affirmative relief, the Board ordered the Company to offer Roger Ruiz and Freeman Parker, Jr. immediate and full reinstatement, to make Ruiz, Parker, Jr., and Burwell whole for any loss of earnings suffered as a result of the Company's discrimination against them, and to post appropriate notices. (R. 32-35, 48-49).

⁹Local 2559, Lumber Handlers Union, which had represented some of the Company's employees since 1952 (R. 30; Tr. 107).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

As shown in the Statement, the Company, in response to the Union's successful organizational campaign, launched a counter-campaign designed to undermine the Union's majority status. Indeed, the very day the Union presented its demand for recognition, general manager Gelleri, after ascertaining the names of the employees who had signed cards, questioned both Parker, Jr. and Ruiz about their union membership, and asked each what kind of inducements the Union had offered. A few days later, Gelleri reminded employee Julia Myers of the benefits which the Company offered, and then asked if she had signed a card. Gelleri also questioned Joseph Pohl about his union membership. And both Gelleri and President Goodman asked Thomas Irving if he had signed a card, and reminded him of the benefits the Company offered its employees in an effort to persuade him to change his mind. Such interrogation about an employee's union membership, unaccompanied by any reassurances that the Company will not visit reprisals for union activity, obviously has a tendency to intimidate employees in the exercise of their Section 7 rights. This is especially so where, as here, there was no legitimate reason for the Company's questions, and the Company was openly trying to erode the support for the Union by persuading Irving to change his mind, and by coercing Parker, Jr. into withdrawing his authorization card (see *infra*). As the Fifth Circuit explained in *Martin Sprocket & Gear Co. v. N.L.R.B.*, 329 F.2d 417, 420 (C.A. 5):

An employer may have a legitimate purpose of merely seeking information which makes it permissible as free speech under Section 8(c). However,

[the Company] had no legitimate reason to ferret out its employees' affiliations, and while questioning these men it offered no assurance against reprisal. Such questions about their union sympathies and activities could well tend to influence the employees and were not permissible as free speech under Section 8(c) of the Act, as they were not the expression of a view, argument or opinion as there contemplated.

Accord: *N.L.R.B. v. Dan Howard Mfg. Co.*, 390 F.2d 304, 306-307 (C.A. 7); *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 703 (C.A. 2); *N.L.R.B. v. Louisiana Mfg. Co.*, 374 F.2d 696, 700-701 (C.A. 8); *N.L.R.B. v. McCormick Concrete Co.*, 371 F.2d 149, 151 (C.A. 4).

For similar reasons, the Company's interrogation of Parker, Sr. about his union membership a few days before the hearing was also violative of Section 8(a)(1) of the Act. As the Court explained in *Joy Silk Mills v. N.L.R.B.*, 185 F.2d 732, 743 (C.A. D.C.), cert. denied, 341 U.S. 914:

The Board has held that "an employer is privileged to interview employees for the purpose of discovering facts within the limits of the issues raised by a complaint, where the employer, or its counsel, does so for the purpose of preparing its case for trial and does not go beyond the necessities of such preparation to pry into matters of union membership" Apparently, this rule means that an employer may question his employees in preparation for a hearing but is restricted to questions relevant to the charges of unfair labor practice and of sufficient probative value to justify the risk of intimidation which interrogation as to union matters necessarily entails; and even such questions may not be asked where there is a purposeful intimidation of employees. Such a standard assumes that interrogation of employees concerning their union activities is of itself coercive, but that fairness to the employer requires that a limited amount of such questioning be permitted despite the possible restraint which may result.

We think that the standard established by the Board, as just described, is a reasonable one, and aptly designed to carry out the purposes of the Act

The fact that the fruits of the questioning are to be used in preparation for a hearing does not make the interrogation any less coercive

Accord: *N.L.R.B. v. Neuhoﬀ Brothers Packers, Inc.*, 375 F.2d 372, 377-378 (C.A. 5); *Retail Clerks International Ass'n v. N.L.R.B.*, 373 F.2d 655, 657-658 (C.A. D.C.). And see cases cited *supra*, p. 14.

The Company also attempted by more direct means to get Parker, Jr. to revoke his union membership. First, Gelleri summoned Parker, Sr. into the office and told him that if he would get his son's card back, the Company would reimburse him for the initiation fee he paid to join the Union. Such a promise of benefit for withdrawal from the Union is clearly violative of the Act if made directly to the employee being solicited. *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 845 (C.A. 9); *N.L.R.B. v. Parma Water Lifter Co.*, 211 F.2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829, and cases there cited. The fact that the promise in this case was communicated indirectly through Parker, Sr. is of no consequence, since the record shows that Parker, Sr. acted as the Company's agent in transmitting its threats and promises to Parker, Jr. See *N.L.R.B. v. State Center Warehouse & Cold Storage Co.*, 193 F.2d 156, 158 (C.A. 9); *N.L.R.B. v. Walter Kocher and Co.*, 211 F.2d 6 (C.A. 2). Compare, *N.L.R.B. v. Tex-Tan, Inc.*, 318 F.2d 472 (C.A. 5) (company's threat never communicated to the employee in question).

Later, after Parker, Jr. had resigned, Goodman told Parker, Sr. to get his son to come back and "sign a card," saying "you either get him down here to sign or else." When Parker, Sr. said he was not sure he could comply with Goodman's instructions because his son had left home, Goodman threatened, "If I lay you off a week you will find that boy" (Tr. 114-115). These efforts on Goodman's part to com-

pel Parker, Sr.'s assistance in achieving his son's withdrawal from the Union plainly constituted a violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Collins & Aikman Corp.*, 338 F.2d 743, 746 (C.A. 5); *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2); *N.L.R.B. v. Longhorn Transfer Service, Inc.*, 346 F.2d 1003, 1005-1006 (C.A. 5).¹⁰

II.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE RUIZ, BY CONSTRUCTIVELY DISCHARGING EMPLOYEE PARKER, JR., AND BY LAYING OFF EMPLOYEE BURWELL, BECAUSE OF THEIR UNION ACTIVITIES

A. Introduction

In seeking to determine whether an employee was laid off or discharged for discriminatory reasons, it is necessary to look at all of the surrounding circumstances. Since there is rarely direct evidence of discriminatory motive, the trier of fact must infer from the evidence available whether the

¹⁰ Although the Company did not specifically state that it was referring to a revocation of Parker, Jr.'s authorization card, it is clear from the context that this is what was meant, and that it was so understood by all. The Company had been insistent from the day of the Union's demand that it wanted Parker, Jr. to withdraw his authorization; it had specifically told Parker, Sr. to obtain such a withdrawal; after Parker, Jr. left the Company and his home, his mother told Parker, Sr. that he had been harassing his son too much about the Union, and that he was "not going to sign" (Tr. 136). Only after Parker, Jr.'s withdrawal was not forthcoming did the Company suggest that he come in to get his pay check; when he complied, the Company asked if he had "brought anything with him" or if he would "sign something," which Parker, Jr. "knew" referred to a revocation of his authorization card. Parker, Jr. refused to sign, and was promptly given his pay check. It is reasonable to infer from these facts that the Company was not merely requesting Parker, Jr. to sign a formal resignation slip, as contended, but rather was demanding a revocation of his authorization card.

reason given by the Company is the real reason for the discharge or a pretext. As this Court stated in *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9):

Nor is the trier of fact -here the trial examiner - required to be any more naif than is the judge. If he finds the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. . . .

Accord: *Aeronca Manufacturing Co. v. N.L.R.B.*, 385 F.2d 724, 727-728 (C.A. 9). Evidence that the Company was hostile to the Union, and was willing to break the law to defeat it, is obviously an important factor in determining the motivation behind the discharges or layoffs, especially when they occur right on the heels of the Union's achievement of majority status. See, e.g., *Aeronca Manufacturing Co. v. N.L.R.B.*, *supra* at 728; *Perel v. N.L.R.B.*, 373 F.2d 736 (C.A. 4).

In this case, the Company was strongly opposed to the advent of the Union. When presented with valid authorization cards from a majority of its employees it first sought to delay, and then flatly refused, to bargain collectively. In the week following the Union's demand for recognition, it coercively interrogated all except one of the card signers, and unlawfully attempted to obtain the withdrawal of Parker, Jr.'s card. Employee Ruiz was discharged the following week; Parker, Jr. left approximately a week later, after continuous pressure from the Company and his father to withdraw from the Union; and Burwell was laid off for three days about two weeks after Parker, Jr. left. Coupling the Company's antiunion attitude with the unusual circumstances surrounding the exodus of these three employees, and the failure of the Company's explanations to withstand scrutiny, the Board was amply warranted in concluding that the Company's actions in regard to each of them were discriminatory, in violation of Section 8(a)(3) and (1) of the Act.

B. Roger Ruiz

As shown above, Roger Ruiz had been employed with the Company since July, and was evidently a satisfactory employee. After his unsuccessful attempt in October to obtain another job because of the better advancement opportunities it offered, the Company had immediately sought to make his prospects at Goodman brighter; it gave him a pay increase and put him in charge of two of the warehouses; it told him that his new job was a "steppingstone to further promotions if he remained with the firm" (Tr. 205-206); it gave him another raise at the end of November; it promised him two more such raises at the end of December and January, and every six months thereafter if his work continued to be satisfactory; and it assured him on at least two occasions during November, the latter instance occurring only two days before the Union's demand for recognition, that his work was good and the Company was satisfied with him. It is evident from this background that the Company was eager to retain Ruiz and to prepare him for further responsibility with the Company—at least until it learned of his union adherence.

Thereafter, the Company's attitude towards him changed abruptly. He was immediately interrogated about his union membership, and reminded of the fact that by the end of January he would be receiving \$130.00 per week (\$20 more than he had earned when initially employed by the Company). A week later, he was suddenly and inexplicably reassigned to the hardware warehouse, his initial place of employment, and was ordered to relinquish the keys to the warehouses of which he had been in charge. He was given no reason for his reassignment, and was not told how long his reassignment would last. And the very next day he was discharged.

These factors in themselves furnish ample support for the Board's determination that Ruiz was discriminatorily discharged. But further support is furnished by the explanations which the Company offered for the discharge. Thus,

Ruiz was first told that the hardware warehouse was over-staffed, an assertion that Ruiz denied, and which seems implausible in any case since Ruiz had just been reassigned to work there the previous day. (Of course, if it was in fact overstaffed, the Company's reassignment of Ruiz can only be explained by a desire on its part to furnish an excuse to discharge him). Ruiz was next told that he was lowest in seniority in the hardware warehouse. But when Ruiz pointed out that this assertion was factually inaccurate, the Company came forward with its final reason¹¹—that Ruiz had given the Company notice in October that he was leaving the firm. This explanation is plainly pretextuous, since the Company had assured Ruiz after this incident that it would be "quite all right" for him to remain with the Company, and had thereafter gone to great lengths to ensure his future commitment to the Company.

In sum, the circumstances surrounding Ruiz's discharge all point to the conclusion reached by the Board: that Ruiz was discharged because of his union activities.

C. Freeman Parker, Jr.

The Company's efforts regarding Freeman Parker, Jr. were more subtle, but equally effective in ridding the Company of another union adherent. Having interrogated him regarding his union membership immediately after the Union's demand for recognition on December 1, and ominously

¹¹ At the hearing, the Company advanced still other explanations, namely that Ruiz had been excessively tardy, and that he had failed to fill orders properly. However, although his time cards (RX 1) disclose that he was a few minutes late on several occasions, they also disclose that he was a few minutes early on other occasions. Furthermore, he was never reprimanded concerning this allegedly excessive tardiness (R. 21; Tr. 205). Regarding his failure to fill orders properly, the Company asserted that on one or more occasions merchandise was returned because of such failures; since there were two other salesmen who filled orders, such mistakes could also be attributable to them, and no showing was made that it was in fact Ruiz who was responsible. (R. 22; Tr. 311-313, 317-318).

warning him that he would eventually withdraw from the Union, President Goodman requested Parker, Jr.'s father to obtain his son's withdrawal from the Union, and even offered to reimburse Parker, Jr. for the initiation fee he had paid to join the Union. For the next two weeks, the record reveals that the Company exerted considerable pressure on Parker, Sr., who, in turn, made his son's life unbearable. Thus, Parker, Sr. said he was "harassed every day" and was "getting hell every day" from the Company (Tr. 111, 136). He then, admittedly, "[gave his son] hell every day," and Parker, Jr. said that "all that time during when the Union was going on, [he] would go home and argue about trying to get into the Union [He] was being bothered by not getting out of the Union by [his] father" (R. 45; Tr. 109; 163, 165, 170-171). Finally, the Company instructed Parker, Sr. to get his son to "resign" (R. 25; Tr. 133, 300), and Parker, Sr., who was "getting tired of the headache", complied: Parker, Jr. not only quit, but left home because of the intolerable pressure to which he had been subjected.

There can be little question, in view of these facts, that Parker, Jr.'s eventual resignation was directly attributable to the pressure exerted by the Company through Parker, Sr. For although it appears that Parker, Sr. was opposed to his son's union membership, there is no evidence that he was actively opposed until after the Company instructed him to obtain his son's withdrawal, or that he exerted any pressure on his son to withdraw until that time. On the contrary, Parker, Sr.'s testimony clearly establishes that he harassed his son because he himself was being subjected to intolerable pressure by the Company to get his son out of the Union. Nor does the Company's statement after Parker, Jr.'s eventual departure—that it had not meant for him to quit in spite of its specific instructions to Parker, Sr. to get his son to "resign"—relieve it of the responsibility for his action. For significantly, the Company did not, on learning that Parker, Jr. had quit, instruct his father that he should, or could, return to his job while still a union member. Instead,

it subjected Parker, Sr. to further pressure to get Parker, Jr. to withdraw from the Union, threatening to lay Parker, Sr. off unless he found the boy. And, when Parker, Jr. finally returned to pick up his final pay check, he was personally asked to sign a revocation of his authorization card (see *supra*, n. 10). Only after the Company ascertained that Parker, Jr. would not sign such a revocation did it give him his final pay check. Therefore, it is evident that the Company was fully responsible for Parker, Jr.'s departure. Moreover, even if it did not intend him to quit but only to "re-sign" from the Union, having achieved the former result, it ratified it by not permitting Parker, Jr.'s return unless he signed a revocation of his union authorization. Under these circumstances, the Board was amply warranted in concluding that the Company constructively discharged Parker, Jr. by subjecting him to such intolerable pressure to withdraw from the Union that he eventually quit, in violation of Section 8(a)(3) and (1) of the Act. *N.L.R.B. v. Tennessee Packers, Inc., Frosty Morn Div.*, 339 F.2d 203, 204-205 (C.A. 6); *N.L.R.B. v. Ra-Rich Mfg. Corp.*, 276 F.2d 451, 453-454 (C.A. 2); *N.L.R.B. v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238, 243 (C.A. 1).¹²

¹²The fact that the Board differed from the Trial Examiner on this issue does not detract from the substantiality of the evidence supporting its decision. As the Court recently stated in *Oil, Chemical and Atomic Workers International Union, Local 4-243 v. N.L.R.B.*, 362 F.2d 943, 945-946 (C.A. D.C.):

. . . For the most part, the problem is one of drawing inferences from evidentiary facts. We may assume for present purposes that there was substantial evidence to support the findings of the Examiner, even though these were based on circumstantial evidence. The Board is, however, the agency entrusted by Congress with the responsibility of making findings in cases arising under the statute, and it is not precluded from reaching a result contrary to that of the Examiner when there is substantial evidence in support of each result

The difference in approach relates to matters where the presumptively broader gauge and experience of members of the Board have a meaningful role. The Board members may or

D. Carbbby Lee Burwell

As shown in the Statement, Carbbby Lee Burwell was, until the advent of the Union, considered a satisfactory employee with no history of complaints or reprimands. Indeed, he had received two raises since his initial employment in July, had been entrusted with additional responsibility in September, and had been complimented on his work on at least one occasion thereafter. However, the very day that the Union demanded recognition, supervisor Levy complained about the quality of Burwell's work for the first time, and ordered him to do some menial tasks, such as scrubbing the cigarette burns on the floor with steel wool, dusting out medicine cabinets, and dusting off the indoor roof of the credit department. A week later, Charles Goodman assigned Burwell to similar additional jobs. Two weeks thereafter, Burwell was suddenly laid off for three days.

The treatment accorded Burwell after the Company learned that he had signed a union card supports the Board's inference that he was actually laid off for his union membership, rather than for legitimate reasons. Further supporting this inference is the treatment he received after he returned. Thus, the day he returned, Levy sarcastically asked him if the floor was dirty enough, and remarked that it could get "a little dirtier" (Tr. 98). Two weeks later, he was "cuss[ed]" for leaving trash on the floor, a dereliction for which he was not responsible. And then Levy pointedly asked Burwell why he did not quit. In view of the Company's obvious antiunion sentiments, its proclivity to commit unlawful acts in an attempt to undermine the Union's majority status, and its marked change in attitude towards

may not be sounder in their inferences and findings than the Examiner, but it is they who have been given the statutory responsibility

Accord: *N.L.R.B. v. Colletti Color Prints, Inc.*, 387 F.2d 298, 302-303 (C.A. 2); *N.L.R.B. v. Tom Johnson, Inc.*, 378 F.2d 342, 344 (C.A. 9).

Burwell beginning immediately after it learned of his union membership, the Board was amply warranted in concluding that his layoff was in fact motivated by his union activities. Of course, even if, as the Company contended before the Board, there was some slackening in the work load at this particular time, that factor will not excuse the Company's layoff of Burwell unless it was the sole motivating cause of his layoff, unaccompanied by any discriminatory motive. *Aeronca Mfg. Co. v. N.L.R.B.*, *supra* at 727; *N.L.R.B. v. Security Plating Co., Inc.*, 356 F.2d 725, 728 (C.A. 9); *N.L.R.B. v. Isis Plumbing & Heating Co.*, 322 F.2d 913, 922 (C.A. 9). The record supports the Board's conclusion here that Burwell's union activities played a substantial role in the Company's decision to lay him off and, therefore, that his layoff was violative of Section 8(a)(3) and (1) of the Act. See, *N.L.R.B. v. Monroe Auto Equipment Co.*, 392 F.2d 559 (C.A. 5); *N.L.R.B. v. Witbeck*, 382 F.2d 574, 576 (C.A. 6); *Post Houses, Inc. v. N.L.R.B.*, 384 F.2d 463 (C.A. 3); *N.L.R.B. v. Crew Builders Supply Co.*, 377 F.2d 992 (C.A. 6).

E. Summary

The overall picture presented on this record is that the Company was unwilling to deal with the Union, and attempted by all possible means to undermine its majority status.¹³ Of the six employees who signed union authorization cards, none escaped without some form of coercion by the Company. Five were interrogated about their union membership within a week after the Union demanded recognition. The four who had first signed cards, on November 19, were dealt with especially harshly: Ruiz was discharged within a week; Freeman Parker, Jr. was harassed in

¹³ As noted above (p. 3, n. 5), the complaint in this case originally contained Section 8(a)(5) refusal-to-bargain allegations, which were withdrawn early in the hearing when the parties entered into a settlement agreement on that aspect of the case (R. 16; Tr. 48-54).

various ways until he finally quit; Burwell was suddenly treated with unusual severity and then laid off for three days; and Irving was questioned and subjected to some persuasion concerning withdrawal. In view of the Company's overall attitude towards the Union, its outright refusal to meet and bargain with the Union for over six months, and its willingness on many occasions to contravene the prohibitions of the Statute, the Board was amply warranted in concluding that the Company's treatment of the three employees in question was violative of Section 8(a)(3) and (1) of the Act.

CONCLUSION

For the reasons stated hereinabove, it is submitted that the Board's order should be enforced in full.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
WARREN M. DAVISON,
ABIGAIL COOLEY BASKIR,
Attorneys,
National Labor Relations Board.

June 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

 RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * *

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

This Appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record ("Tr.").

GENERAL COUNSEL'S EXHIBITS

<u>NO.</u>	<u>IDENTIFIED</u>	<u>OFFERED</u>	<u>RECEIVED IN EVIDENCE</u>	<u>REJECTED</u>
1 (a) thru 1 (L)	6	5	7	
2	15	20	20	
3	16	20	20	
4	16	20	92	
5	16	20	20	
6	16	20	20	
7	17	20	20	
8A	48	49	49	
8B	49	49	49	
9	58	—	59	
10	174	176	—	176
11	290			

RESPONDENT'S EXHIBIT

<u>NO.</u>	<u>IDENTIFIED</u>	<u>OFFERED</u>	<u>RECEIVED IN EVIDENCE</u>	<u>REJECTED</u>
1	232	265	266	

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 1 1968

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S
UNION; AND LOCAL 4, INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION, Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

FILED

JUN 28 1968

WM. B. LUCK, CLERK

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
IAN D. LANOFF,
Attorneys,

National Labor Relations Board.

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Section 8(b)(4)(ii)(D)	2, 11, 13
Section 10(e)	1
Section 10(k)	2, 9, 12

MISCELLANEOUS:

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,747

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S
UNION; AND LOCAL 4, INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION, Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued against International Longshoremen's and Warehousemen's Union; and Local 4, ILWU (hereafter referred to as Longshoremen) on April 13, 1967.

The Board's decision and order in the unfair labor practice proceeding (R. 48, 43-45)¹ are reported at 163 NLRB No. 142. The Board's earlier decision and determination of dispute in the underlying Section 10(k) proceeding (R. 5-14) is reported at 158 NLRB 1024. This Court has jurisdiction of the matter, the unfair labor practices having occurred in Vancouver, Washington.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Longshoremen engaged in conduct proscribed by Section 8(b)(4)(ii)(D) of the Act,² with an object of forcing or requiring Aluminum Company of America (hereafter referred to as the Company) to assign certain work in dispute—the unloading of the Company's cargo at its dock at Vancouver, Washington—to employees represented by the Longshoremen rather than to company employees represented by the Aluminum Trades Council of Vancouver, Washington, affiliated with the Aluminum Workers International Union and Local 300 (hereafter referred to as Aluminum Workers). The Board, in the earlier proceeding pursuant

¹References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleading," are designated "R". References to portions of the stenographic transcript of the underlying Section 10(k) proceeding are designated "Tr.", while portions of the transcript of the unfair labor practice hearing are designated "Tr., ULP." "EX", "LX", or "AX" refer to the exhibits of the Employer, the Longshoremen, and the Aluminum Workers, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

²The pertinent statutory provisions are set forth *infra*, p. 24.

to Section 10(k) of the Act, determined that the Longshoremen were not entitled to perform the disputed work and rendered an affirmative award of the work to the employees represented by the Aluminum Workers.

A. The nature of the work in dispute

The Company is engaged in the manufacture of aluminum products at plants throughout the United States, including the Vancouver Works at Vancouver, Washington (R. 6, 33; Tr. 22). The Vancouver Works is a large smelter and aluminum casting and fabricating plant located on a tract of land adjacent to the north bank of the Columbia River—some 4 miles downstream from Vancouver, Washington, and Portland, Oregon (R. 7, 37; Tr. 22-23).

At its Vancouver Works the Company produces various kinds of semi-finished and finished aluminum products from alumina, a fine, powdery, difficult to handle, material obtained by refining bauxite ore (R. 7 fn. 3; Tr. 17, 78, 137-138, 149).

From 1940 to 1965, alumina had been shipped to the Vancouver Works exclusively by railroad boxcars from company owned refining plants in Louisiana and Texas (R. 7, 37; Tr. 31).³ For the last 18 of those 25 years, the alumina was unloaded from the boxcars and transported to and from storage areas and finishing mills by Aluminum Workers—the exclusive certified representative of the production and maintenance employees at the Vancouver Works since 1947

³For a short time during a 1948 flood, alumina was brought to the Vancouver Works by barge from the Port of Vancouver, and was unloaded by company production employees, using a bucket crane (R. 7 fn. 4; Tr. 31-32).

(R. 6-7, 37; Tr. 23-24, 30). Longshoremen has no contract with the Company and has never represented company employees (R. 7, 12; Tr. 31).

In October 1965, the Company began receiving most of its alumina by vessel directly from its new refining facilities at Surinam, South America, while continuing to receive alumina in reduced quantities by railroad boxcar (R. 7-8, 37; Tr. 32, 52). To unload the vessels, the existing conveyor system was simply extended from the boxcar unloading shed to a hopper located on a piling in the Columbia River (R. 8; Tr. 60, 66-67, 145-146). Mooring buoys were also constructed to secure the vessel during discharge of the ship (R. 8; Tr. 66-67).

Whereas alumina is pulled from the boxcars by air equipment, the ship is unloaded by the use of a clam-shell bucket operated by a crane, which scoops the ore out of the hold of the vessel and deposits it into the hopper (R. 7-8; Tr. 63-65). Ordinarily a bulldozer must be used to move some alumina from the corners of the hold to within reach of the crane (Tr. 80).

When the alumina is delivered by ship, the alumina flows onto the extended conveyor belt from the hopper, then moves through the boxcar unloading shed and blends with alumina being unloaded from boxcars (Tr. 139, 146, 148). Whether a boxcar or ship delivery is involved, alumina is next deposited in storage tanks. From the storage tanks, the alumina is discharged into buckets which are transported by overhead cranes to hoppers from which it is fed into electrolytic cells, called "pots", for processing (R. 7; Tr. 139). These

facilities are owned by the Company and are used exclusively for alumina unloading (R. 8, 11; Tr. 36-37, 60).⁴

Only one ship was used for alumina delivery at the time of the Section 10(k) hearing, the SS *Lysland*, which is leased by the Company and carries only company-owned bulk alumina (R. 8, 11; Tr. 32, 36, 37).⁵ The round-trip between Surinam and Vancouver takes approximately 45 days, and upon arrival, eight or nine times a year, the ship is unloaded by a crew comprising an ore craneman-transferman, two ore transfermen, and a laborer (R. 8; Tr. 35).

Altogether 16 company employees do the unloading work as 4 shifts are necessary to ensure seven-day a week, around the clock unloading of the ship. (R. 8; Tr. 94-95, 144-145). These employees also unload railroad boxcars, and are regularly employed in the production and maintenance unit represented by Aluminum Workers. Throughout the Vancouver Works, alumina is commonly moved from place to place by employees using cranes and conveyors, and in performing such plant tasks substantially the same skills are required as those involved in unloading the *Lysland* (R. 8, 12; Tr. 142, 148-149, 202). Thus, when the *Lysland* is not in port or cannot be unloaded because of difficulties with the unloading equipment, com-

⁴These unloading facilities were to be superseded in 1967 by a dock with a shore-based gantry-type crane which would scoop alumina from the holds of the vessel and run on rails from the ship to the starting point of the conveyer (R. 8; Tr. 140-141).

⁵However, it was contemplated that more than one ship would be leased by the Company, and in fact since then one other ship has been used, the SS *Raold Jarl* (R. 41-42; Tr. 81, Tr. ULP 33-35).

pany employees can work elsewhere in the plant (R. 8, 12; Tr. 150, 202).

The Company's employees required little special training, and have performed their duties satisfactorily (R. 12; Tr. 151-152). Nevertheless, if the work is assigned to Longshoremen, it would be performed by persons who are not regular company employees, and company officials contemplate a reduction in force of employees represented by the Aluminum Workers (R. 11-12; Tr. 47, 153).

**B. Longshoremen pressure company officials to assign
the disputed work to its members**

In late September 1965, shortly before the first scheduled arrival of the SS *Lysland* at Vancouver, Longshoremen International Representative James Fantz telephoned Vancouver Operations Manager Rudolph Anderson, and asked for an appointment. Anderson agreed to see Fantz and the two men met at a company office on September 30, 1965 (R. 8, 37-38; Tr. 37, 277-278).⁶

The Longshoremen representative told Anderson that he had heard about an incoming shipload of alumina, and wanted to notify the Company that Longshoremen had men available for unloading (R. 8, 38, 41; Tr. 38, 280-281). In response, Anderson advised Fantz that as company employees had been unloading alumina for 25 years, the Company felt obliged to give consideration to its employees represented by Aluminum Workers (R. 41; Tr. 38-39, 283-284). The

⁶Also attending the meeting were Edward D. Andrew, representative of Longshoremen's Local # 4, George Stout, production manager of the Vancouver operation, and George Case, labor relations and personnel supervisor at the Vancouver Works (R. 38; Tr. 38).

parties then discussed the Company's desire to have the ships unloaded on a 24-hour-a-day basis. Fantz felt around-the-clock work could be arranged, but told the company officials that Longshoremen working after 3 o'clock each afternoon would have to be paid at overtime rates (R. 38; Tr. 40, 281).

In the course of the conversation, Fantz referred to "the difficulty" his union was having with Harvey Aluminum Company (R. 8, 38, 41; Tr. 284, 39). At the time, Harvey Aluminum, a neighboring competitor of the Company, was being picketed by Longshoremen over the same type of disputed work assignment. Company officials were aware of "the difficulty" the Longshoremen were having with Harvey (R. 38; Tr. 39). The conference ended when Anderson informed Fantz that the Company felt the work rightfully belonged to Aluminum Workers, but that the Company would review the matter in light of Longshoremen's request (R. 38; Tr. 41).

After conferring with Aluminum Workers officials, and being advised of their belief that the disputed work was covered by the terms of the parties' collective bargaining agreement, as well as that Union's resolve to enforce the agreement, Anderson phoned Fantz and arranged for a meeting on October 19, 1965 (R. 38; Tr. 41-43). At this meeting were Fantz, for the Longshoremen, and Stout, Case, and Anderson for the Company (R. 38; Tr. 43).

Longshoremen representative Fantz immediately "requested a specific answer because of the shortness of time between [today] and the day the ship [is] to arrive," and "informed them that we again want to emphasize the fact that we consider this Longshore work—work that we should do" (R. 38; Tr. 289). Anderson indi-

cated that the Company had decided to use its own plant and people, and indicated the basis of the Company's decision (R. 38-39; Tr. 44). To this Fantz responded, "[O]ur union [will] use whatever methods we [find] at our disposal to try to keep work that we consider [is] properly ours" (R. 38, 40-41; Tr. 291-292). The company official answered by reminding Fantz that the Company had previously enjoyed friendly relations with the Longshoremen; in fact the Company had shipped aluminum products out of the docks at Vancouver or Portland for 20 years. In 1964, Anderson reminded Fantz, the Company had shipped something like 30,000 tons over those docks with the Longshoremen doing all the longshore work (R. 40; Tr. 46). When Anderson then expressed the Company's hope of continuing these good relations, the union representative replied: "I will be very frank with you. If this work is given to the Aluminum Workers, it will disrupt the harmonious relationship with us and you can expect trouble in other areas" (R. 9, 39, 41; Tr. 46-47, 158). Anderson asked what Fantz meant by "other areas," and whether he was referring to the Port of Vancouver (R. 39; Tr. 47, 158).⁷ Fantz answered in the affirmative, and stated that, "things could happen to the Company's cargo and the Company could have trouble shipping" (R. 9, 39, 41; Tr. 47, 158). Following this meeting, the SS *Lysland* delivered its cargo to the Company's dock, but returned to Surinam empty (R. 41; Tr., ULP 38).

In the early part of December, before the second scheduled arrival of the *Lysland*, Company officials arranged for another talk

⁷The Company uses the facilities of the Port of Vancouver to ship large quantities of its finished products (R. 39; Tr. 46-47).

with union representative Fantz (R. 39; Tr. 50). At this final meeting, Operations Manager Anderson told the Longshoremen representatives of the Company's plan to load out a thousand tons of Cryolite, boxed in plywood containers each weighing 5,000 pounds, and ship it to Surinam on the next return voyage of the *Lysland* (R. 39; Tr. 50). Anderson indicated that the Company planned to ship this material by boxcar to the Port of Vancouver, and have Longshoremen then load the boxed material aboard the *Lysland* (R. 39; Tr. 50-51). Anderson explained that he wanted to know about a rumor that the *Lysland* had been declared "hot" by the Longshoremen, as the Company did not want to send a thousand tons of material to Vancouver only to find out that Longshoremen would not load the cargo (R. 39; Tr. 50-51). Union official Fantz replied that the Longshoremen "... would not load the *Lysland* on this trip" (R. 9, 41-42; Tr. 51, 158-159). Then Fantz said that the ship was "black-listed," and when asked to explain, stated that the Longshoremen would not "work the ship" (R. 42; Tr. 51).

Subsequent to this meeting between the parties, the *Lysland* made trips from Surinam to the Company's facilities at the Vancouver Works on three or four occasions. Each time the ship returned to Surinam without cargo (R. 41; Tr., ULP 37).

C. The Company files unfair labor practice charges and the Section 10(k) proceeding is held

The Company filed a charge with the Board on October 20, 1965, alleging that the Longshoremen were violating Section 8(b)(4)(ii)(D) of the Act. After a hearing, the Board issued its Decision and Determination of Dispute on May 20, 1966, holding that the

employees of the Company represented by Aluminum Workers were entitled to continue to perform the work of unloading alumina from the *Lysland* when it docked at the Vancouver Works. Accordingly, the Board also found that the Longshoremen were not lawfully entitled to force the Company to assign the disputed work to workers represented by it. The Board directed the Longshoremen to notify the Regional Director within 10 days whether it would comply with the Board's determinations. Such notification was never received.

Subsequently, on September 6, 1966, the General Counsel issued a complaint against the Longshoremen alleging a violation of Section 8(b)(4)(ii)(D) of the Act. The Longshoremen's answer to the complaint admitted the failure to notify the Regional Director and indicated that the Local did not intend to comply (R. 34). A hearing was held before a Trial Examiner on November 3, 1966. At that hearing, the parties stipulated that the record of the Section 10(k) proceeding be received into the record of the unfair labor practice proceeding (R. 36).

II. THE BOARD'S CONCLUSIONS AND ORDER

In agreement with the Trial Examiner, the Board concluded that Longshoremen violated Section 8(b)(4)(ii)(D) of the Act by threatening to refuse to perform work and by coercing and restraining the Company, with an object of forcing or requiring the Company to assign the work of unloading alumina from the *Lysland* at the Vancouver Works to workers represented by Longshoremen rather than to company employees represented by Aluminum Workers. The Board's order requires Longshoremen to cease and desist from engag-

ing in the foregoing violations of Section 8(b)(4)(ii)(D) of the Act and to post appropriate notices.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION VIOLATED SECTION 8(b)(4)(ii)(D) OF THE ACT

A. Introduction—The Statutory Framework

Section 8(b)(4)(ii)(D) of the Act, in relevant part, makes it an unfair labor practice for a labor organization or its agents:

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * *

Section 8(b)(4)(D) is supplemented by Section 10(k) which provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the

parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.^[8]

These sections render unlawful threats, restraints, and other coercive conduct aimed at forcing the reassignment to employees in one labor organization of work already assigned to members of another labor organization. Thus, a violation of Section 8(b)(4)(ii)(D) presumes two elements: (1) the labor organization must “threaten, coerce or restrain” any person engaged in commerce; and (2) an object of this conduct must be to force an employer to reassign work from employees in one labor organization to those in another.

⁸ Accordingly, where, as here, a Section 8(b)(4)(D) charge is filed and the parties to the underlying work dispute do not adjust or agree to adjust the dispute voluntarily, proceedings on the unfair labor practice charge are held in abeyance while the Board hears and determines the work dispute pursuant to Section 10(k). If the Board awards the disputed work to a union other than the one against which the charge was filed, and the latter union does not agree to comply with the Board’s determination, the unfair labor practice case proceeds, culminating in a Board decision and order subject to court review. Since the Act provides no independent review of the Board’s Section 10(k) work assignment, the only stage at which the losing party in that proceeding can challenge the Board’s work award is in conjunction with judicial review of the Board’s subsequent Section 8(b)(4)(D) unfair labor practice finding. *N.L.R.B. v. International Longshoremen’s & Warehousemen’s Union (United States Steel Corp.)*, 378 F.2d 33, 35-36 (C.A. 9), cert. denied, 389 U.S. 1004.

B. Substantial Evidence Supports the Board's Conclusion that Respondent Threatened, Restrained, and Coerced the Company for an Object Proscribed by Section 8(b)(4)(ii)(D) of the Act

On the facts found by the Board, there can be no question but that Longshoremen officials illegally threatened the Company with labor trouble if Longshoremen were not given the work already assigned to employees represented by the Aluminum Workers. Nor is there any real question but that these coercive threats in fact restrained the Company's pursuit of its legitimate business interests.

Thus, after Longshoremen representative Fantz learned that a shipload of alumina would soon be arriving at the Company's private dock, he arranged a meeting with company officials. As the record indicates, he told the Company that Longshoremen had men available to perform unloading tasks, and when company official Anderson indicated that the Company felt obligated to also consider employees represented by Aluminum Workers, who had been performing unloading tasks at the Company for the past 25 years, the Longshoremen representative called attention to the similar "difficulty" that his union was having with Harvey Aluminum (Tr. 284). Since Longshoremen and Harvey Aluminum were at that time embroiled in a similar dispute, with Longshoremen picketing that firm, the implication that the same treatment lay in store for the Company was readily apparent in Fantz' remark.

Longshoremen representative Fantz maintained this same attitude at the second meeting between the parties, held shortly before the alumina-bearing *Lysland* was scheduled to arrive. Fantz opened the meeting by declaring that the work of unloading alumina from

ships belonged to Longshoremen, and advised the Company that "Our Union would use whatever methods we found at our disposal to try to keep work that we considered was properly ours" (Tr. 291-292). Company official Anderson then informed Fantz that management had concluded the work properly belonged to present company employees represented by Aluminum Workers. He explained the Company's fears that a decision in favor of Longshoremen would not only violate the Company's contract with Aluminum Workers, but might well result in the discharge of some company employees. But, Fantz remained adamant in his demand for the work. He told the Company that he would be very frank: if the Company did not change its mind but assigned this work to the Aluminum Workers, the Company "could expect trouble in various areas" (Tr. 46-47, 158). Asked by Anderson to be more specific, and whether he was referring to the port of Vancouver, Fantz suggested that "things could happen to the Company's cargo" at Vancouver and "the Company could have trouble shipping" (Tr. 47, 158).

In early December, the Company decided to ship a thousand tons of Cryolite to Surinam on the next return voyage of the *Lysland*. Fearing economic damage if the Company delivered the Cryolite to the dock at Vancouver, and the Longshoremen then refused to load it, Anderson arranged a third meeting with Fantz. At this meeting, Anderson informed Fantz of the Company's intention and asked him whether there might be "trouble" (Tr. 50-51). Fantz confirmed that the Longshoremen ". . . would not load the *Lysland* on this trip" (Tr. 51, 158-159). He elaborated, referring to the *Lysland* as "blacklisted" and stated that Longshoremen would not "work

the ship” (Tr. 51). The Cryolite was not shipped and the *Lysland* returned empty to Surinam.

On the facts shown, it is plain that Fantz’ threats of labor trouble, aimed at forcing the Company’s assignment of the disputed work to Longshoremen, constituted conduct proscribed by Section 8(b)(4)(ii)(D). This Court and others, have consistently held that threats to picket constitute “threats, restraint and coercion” within the meaning of Section 8(b)(4). *N.L.R.B. v. District Council of Painters # 48*, 340 F.2d 107, 111 (C.A. 9), cert. denied, 381 U.S. 914; *N.L.R.B. v. Local 825, Operating Engineers*, 315 F.2d 695, 697-698 (C.A. 3); *N.L.R.B. v. Local 254, Building Service Employees International Union*, 359 F.2d 289, 291 (C.A. 1).⁹ And it is settled law that threatening a strike or work stoppage constitutes a violation of Section 8(b)(4)(ii)(D) where, as here, it is done for the object of forcing the reassignment to employees in one labor organization of work already assigned to members of another labor organization. *N.L.R.B. v. Local 676, International Brotherhood of Teamsters, etc.*, 376 F.2d 3, 4 (C.A. 3); *N.L.R.B. v. Denver Photo Engravers Union No. 18*, 351 F.2d 67, 70-71 (C.A. 10); *N.L.R.B. v. Local Union No. 3, International Brotherhood of Electrical Workers, etc.*, 339 F.2d 145, 146-147 (C.A. 2); *New Orleans Typographical Union No. 17 v. N.L.R.B.*, 368 F.2d 755, 762 (C.A. 5); *N.L.R.B. v. Local 25, International Brotherhood of Electrical Workers, etc.*, 383 F.2d 449, 452-453 (C.A. 2).

⁹The legislative history of this provision discloses that by use of the term “threaten, coerce or restrain,” Congress intended to foreclose threats against employers of “labor trouble or other consequences” as well as prohibit the carrying out of such threats by means of a “strike or other economic retaliation.” II Leg. Hist. 1568(2); 1750(1); 1523(1); 1581(1).

C. The Board's Determination in the Section 10(k) Proceeding that Employees Represented by the Aluminum Workers Are Entitled To Perform the Work in Dispute Is Neither Arbitrary Nor Capricious

In *N.L.R.B. v. Radio and Television Broadcast Engineers*, 364 U.S. 573, 583 (commonly referred to as the *CBS* case), the Supreme Court held that Section 10(k) of the Act requires the Board to determine the merits of jurisdictional disputes by affirmatively deciding which group of employees is entitled to the disputed work on the basis of all relevant factors. The Court recognized that its holding would force the Board to exercise "powers which are broad and lacking in rigid standards to govern their application." 364 U.S. at 583. Because of the Board's "long experience in hearing and disposing of similar problems" and its "knowledge of the standards generally used by arbitrators, unions, employers, joint boards, and others in wrestling with this problem," the Court expressed confidence in the capacity of the Board to meet its responsibilities. *Ibid.*¹⁰

In *International Association of Machinists, Lodge 1743 (Jones Construction Co.)*, 135 NLRB 1402 (cited with approval, *N.L.R.B. v. Local 825, International Union of Operating Engineers*, 326 F.2d 213, 217 (C.A.3)), a case coming to the Board soon after the *CBS* decision, the Board outlined its approach to this area (135 NLRB 1410-1411):

¹⁰The Court said further that "administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board." 364 U.S. at 583.

At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration.

As such Section 10(k) determinations have come before the courts of appeals for review, the governing standard has necessarily been whether the Board has abused its discretion—that is, whether the Board has been arbitrary or capricious—in making a particular work assignment. Because the Board has a broad statutory mandate to apply its expert judgment flexibly, courts have uniformly recognized the limited scope of judicial review of the Board's award in such matters. *N.L.R.B. v. International Longshoremen's & Warehousemen's Union (United States Steel Corp.)*, *supra*, at 35-36 (C.A. 9). Accord: *N.L.R.B. v. Local 825, International Union of Operating Engineers*, *supra*, 326 F.2d at 217 (C.A. 3); *N.L.R.B. v. St. Louis Printing Pressmen and Assistants Union No. 6, Inc.*, 385 F.2d 956, 960 (C.A. 8); *N.L.R.B. v. Local 676, International Brotherhood of Teamsters, etc.*, *supra*, 376 F.2d at 5 (C.A. 3); *New Orleans Typographical Union v. N.L.R.B.*, *supra*, 368 F.2d at 761-765 (C.A. 5).

As we now show, the Board gave careful consideration in the Section 10(k) proceeding to all relevant factors in determining which of the two competing groups of employees was entitled to the dis-

puted work. The Board's decision, awarding the work of unloading the *Lysland* at Vancouver to employees represented by Aluminum Workers, is reasonable and within the area of discretion entrusted to it by the Act.

As the Board noted, the factors relied upon in making its determination in the case at bar are virtually the same as those present in *NLRB v. International Longshoremen's and Warehousemen's Union, supra* (R. 11).

Here, as the Board pointed out, Longshoremen has never had a contract with the Company, nor is it the certified representative of any of the Company's employees. Aluminum Workers is the certified representative of the Company's production and maintenance employees and has had a continuing contract relationship with the Company since 1947. Although Aluminum Workers' certification and contract does not specifically cover the work of unloading ships, jobs which came into existence after the certification was issued, the job descriptions with respect to the disputed work are substantially identical with those of regular jobs included in the regular production and maintenance unit (R. 10-12; Tr. 30, 162-163, EX. 1). Further, the present contract has been interpreted by the parties to cover the work in dispute (R. 12, 8; Tr. 212).

The employees represented by Aluminum Workers have been doing the unloading work to the Company's satisfaction since the operation began. And, as the Board noted, "Award of the work to longshoremen would result in a loss of jobs by employees represented by [Aluminum Workers], whereas an award to the latter would not

entail a job loss to longshoremen because they have never performed this work” (R. 12).

Although longshoremen on the Pacific Coast are generally experienced in the unloading of ships with cranes, employees represented by Aluminum Workers regularly in the course of the plant’s normal operations, convey and unload alumina from railroad cars with large overhead cranes. And while company employees are considered experienced in lifting the powdery alumina involved, as the Board noted, “. . . longshoremen who might be referred to the Employer may not be experienced in handling alumina” (R. 12).

Employment of Longshoremen for the unloading work would almost certainly decrease the efficiency and economy of the operation. Longshoremen would have to be transported to the job site to perform intermittent work of a limited nature. On the other hand, unloading ships complements the work of employees represented by Aluminum Workers who are permanently and regularly employed in loading, unloading and transporting aluminum throughout the Vancouver Works.¹¹

Before the Board, Longshoremen argued that their constitution and traditional practice of unloading ships on the Pacific Coast support their claim to the disputed work. In the instant case, however, the employees are unloading only the Company’s cargo at the Company’s dock, a circumstance distinguishing this from normal long-

¹¹As the Board noted, the employment of longshoremen could result in other unnecessary costs to the Company, arising from the necessity of hiring extra supervisory personnel (R. 12; Tr. 251, 257-258), and from the payment of special overtime rates to longshoremen because of the Company’s plans for unloading on a 24-hour a day schedule (R. 38; Tr. 174).

shoremen's work. Indeed, Longshoremen's collective-bargaining agreement with the Pacific Maritime Association, an organization of shipping and stevedoring companies, specifically exempts from coverage a non-member of PMA, such as the Company, who "has control over the cargo at its premises *or* on its vessel . . ." (emphasis ours) (R. 11 fn. 8; Tr. 237, 275, EX. 8, LX 3). Similarly the cases relied upon by Longshoremen before the Board¹² in support of its position are inapposite, as those cases involved the unloading of ships at commercial docks by shipping and stevedoring companies which were members of the PMA and thus had a contractual relationship with Longshoremen.

Before the Board, respondent also argued that because the Company leases its ships, and does not own them, this case is distinguishable from the *United States Steel* case, *supra*. In rejecting this argument, the Board stated, "Here, as there, the ship is at all times under the control of the Employer and carries only cargo owned by the Employer; and the work in dispute is at a dock also owned by the Employer and located on its premises" (R. 11). The Board also noted that the Longshoremen's contract with PMA fails to draw such a distinction, and would exempt the Company from coverage here, as well as in that case (R. 11 fn. 8).

In sum, therefore, we submit that as in *International Longshoremen's and Warehousemen's Union (United States Steel Corp.)*, *supra*, the Board's determination represents a balanced and conscientious consideration of all factors presented and is neither arbitrary nor

¹²*American Mail Line*, 144 NLRB 1432; *Albin Stevedore Co.*, 144 NLRB 1443; *Howard Terminal*, 147 NLRB 359.

capricious, but is, in fact, amply supported by the evidence. See *Local 1291, International Longshoremen's Association (United States Steel Corporation)*, 154 NLRB 1415, 151 NLRB 1, 2-6, enf'd *per curiam*, 375 F.2d 1011 (C.A. 3), cert. denied, 389 U.S. 930; *N.L.R.B. v. Local 676, International Brotherhood of Teamsters, etc., supra*, 376 F.2d at 5 (C.A. 3); *N.L.R.B. v. St. Louis Printing Pressmen and Assistants Union No. 6, Inc., supra*, 385 F.2d at 960-961 (C.A. 8); *N.L.R.B. v. Local 991, International Longshoremen's Assn.*, 332 F.2d 66, 70-71 (C.A. 5).

CONCLUSION

For the reasons stated, we respectfully submit that a decree should enter enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
IAN D. LANOFF,
Attorneys,

National Labor Relations Board.

June 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel,
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

Pursuant to Rule 18.2(f) of the Rules of the Court:

EXHIBITS AT 10(k) HEARING

BOARD'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received</u>	<u>Rejected</u>
1	5	5	

ALUMINUM WORKERS' EXHIBITS

1	6	9	
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EMPLOYER'S EXHIBITS

1	19	21	
2	24	29	
3	25	29	
4(a), (b), (c)	26	29	
5	105	107	
5(a)	131	131	
6	112	113	
7	145	149	
8	236	262	

ILWU EXHIBITS

1	19	21	
2	272	273	
3	276	276	

EXHIBITS AT ULP HEARING

GENERAL COUNSEL'S EXHIBITS

1(a) thru 1(h)	28	28	
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JOINT EXHIBITS

1, 2, 3	29	29	
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APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

LIMITATIONS

Sec. 10(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

No. 22,747

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VS.

INTERNATIONAL LONGSHOREMEN'S AND WARE-
HOUSEMEN'S UNION; and LOCAL 4, INTER-
NATIONAL LONGSHOREMEN'S AND WARE-
HOUSEMEN'S UNION,

Respondents.

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

BRIEF ON BEHALF OF RESPONDENTS

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,

1182 Market Street - Room 320,

San Francisco, California 94102,

Attorneys for Respondent Unions.

AUG 27 1957

WILLIAM H. LUCK, CLERK

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II.

Since this case is not controlled by the Steel Corporation case, this court is free to examine the record here which demonstrates that the Board's determination was arbitrary, capricious and should not be enforced..	9
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SUMMARY OF ARGUMENT

1. The *Steelworkers* case, 378 F. 2d 33 (9 Cir., 1967) is not controlling. Despite the apparent similarity of the two cases, there are factors here which were not present in that case. This case represents an unjustified effort to extend the *Steel* case far beyond the bounds of that holding and represents, even more than it did in the *Steel* case, a serious intrusion into traditional longshore jurisdiction over commercial unloading (and loading) operations.

2. Every relevant factor demonstrates that the Board's award of the work to the aluminum workers was arbitrary and capricious: the traditional jurisdictional lines on the West Coast waterfront, the constitutions of the respective organizations, the certifications by the National Labor Relations Board, the collective bargaining contracts. To ignore all of this is to encourage turmoil not stability in labor relations.

ARGUMENT

I.

NATIONAL LABOR RELATIONS BOARD v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (UNITED STATES STEEL CORPORATION), 378 F. 2d 33 (9 CIR., 1967), DOES NOT REQUIRE THE ENFORCEMENT OF THE BOARD'S ORDER IN THIS CASE SINCE THE UNDERLYING BOARD'S DECISION IN INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AND UNITED STATES STEEL CORPORATION, 150 NLRB 88 (1964) IS DISTINGUISHABLE FROM THE CASE AT BAR.

Any discussion of the issues of this case must start with a consideration of this court's opinion in *National Labor Relations Board v. International Longshoremen's Union (United States Steel Corporation)*, *supra*, 378 F. 2d 33 (9 Cir., 1967), in which this court enforced a Board order in *International Longshoremen's and Warehousemen's Union and United States Steel Corporation*, 154 NLRB 1363 (1965), which, in turn, rested upon the Board's determination of a dispute reported at 150 NLRB 88 (1964).

Since this court did not undertake an independent review of the record in that case, but merely satisfied itself that the Board had considered the relevant factors and had evaluated the evidence in regard thereto (378 F. 2d at 36), it is necessary to examine the underlying Board determination to see whether it compels the enforcement of the order involved herein, or whether to the contrary, it indicates that the decision should have been in favor of the longshoremen.

In the *Steel* case, the Board was faced with what appears to have been a problem similar to the one

presented here. However, appearances, as they so often are, are deceiving and, upon close analysis, it is clear that not only does *Steel* not compel the result here sought by Alcoa and the Trades Council, but indeed compels a contrary result.

In *Steel*, the Board stated that of the many factors regarded as relevant, "some . . . weigh in favor of an award to longshoremen, some favor an award to steelworkers". We shall examine the factors referred to by the Board and shall point out that *in this case* they all compel an award to longshoremen.

1. Like the situation in *Steel*, the work in dispute here is a new operation (Tr. 33, 67-68, 89). Alumina ore had never before been unloaded from a ship at the employer's premises in Vancouver (Tr. 90).² However, unlike the *Steel* situation where billets had never before been unloaded by longshoremen, alumina ore and other free flowing cargo has been unloaded, *and by longshoremen*, at the adjacent port of Vancouver (Tr. 90, 220-224, 298-306).

2. In *Steel*, the Board recognized that by its constitution the ILWU asserts jurisdiction over "all workers employed in the loading and unloading of vessels, and operations incidental to such loading and unloading". That same constitution is here in evidence (ILWU Ex. 2). The Board has accorded significant weight to the clear language of a union's constitution in the past (*Local 825, International Union of Oper-*

²This needs to be qualified with regard to the use of barges during the Van Port flood of 1948 (Tr. 31-32; 52-53); but this situation, resulting from a natural catastrophe, was so unique as not to form any kind of precedent.

ating Engineers [*Nichols Electric Co.*], 137 NLRB 1425, 1431, 1434 [1962]); it should have done so in this case.

3. As the Board pointed out in *Steel*, "the unloading of ships on the West Coast is traditionally performed by longshoremen". Indeed, in this case, the record is clear that longshoremen have traditionally performed, and do now perform, the work of unloading free flowing cargo such as, and specifically including, alumina ore (Tr. 90, 220-224, 298-306). The Board has accorded significant weight to the factor of past practices in other cases (*International Longshoremen's and Warehousemen's Union, Local 6* [*Puget Sound Tug & Barge Co.*], 144 NLRB 1489, 1494, 1495 [1963]; *Wilkes-Barre Typographical Union* [*Llewellyn & McKane*], 148 NLRB No. 269 [1964]); it should have done so in this case.

4. The work of unloading the *LYSLAND* involves not only the operation of cranes, long since assigned to longshoremen by the Board (*International Longshoremen's and Warehousemen's Union* [*Ameri-man Mail Line*], 144 NLRB 1432 [1963]; *International Longshoremen's and Warehousemen's Union* [*Albin Stevedore Company*], 144 NLRB 1443 [1963]; and *International Longshoremen's and Warehousemen's Union* [*Howard Terminal*], 147 NLRB 359 [1964]), but also bulldozing of cargo in the hold of a ship (Tr. 144), work traditionally performed by longshoremen and performed in this case *not with Alcoa's tools, but with rented longshore equipment* (Tr. 80). *This was not true in Steel.*

5. In *Steel*, the Board noted that traditional long-shore jurisdiction “does not appear to be clearly established with regard to the unloading of cargo from a ship, *where both the ship and cargo are owned by an employer*, at a dock also owned by that employer and located on its premises” (emphasis supplied).³ In the instant case, it is to be noted that the SS *LYSLAND* *is not owned* by the employer (Tr. 59, 92), *nor is the crew employed by the employer* (Tr. 167). It is further to be noted that the *LYSLAND*, unlike the SS *COLUMBIA* (the vessel involved in *Steel*) is not used “for the sole purpose” of carrying the alumina ore, and that, while the *COLUMBIA* “carries nothing on the return trip”, this is not true of the *LYSLAND*. The *LYSLAND* has sailed into Vancouver with three empty holds (Tr. 72) which could be used to carry other cargo, and it has attempted to carry outbound cargo from Vancouver to be loaded by longshoremen at the public dock in that city (Tr. 50-51, 295), and its sister ship, the SS *JARL RAOUL*, which the company is now using in the same operation, has on the return voyage stopped at Portland, Oregon, and taken on ordinary commercial outbound cargoes of wheat loaded by longshoremen (Tr.

³The importance of the factors underlined, in the Board’s view, is evidenced by its later Order Clarifying Decision and Determination of Dispute, dated January 11, 1965. In its original decision, the Board has held that the steelworkers were entitled “to unload *ships* at the Employer’s Pittsburgh Works’ Dock”. On the Petition for Clarification, the Board modified the foregoing language and held that the steelworkers were entitled only “to unload *the Employer’s cargo from Employer’s ships at the Employer’s Pittsburgh Works’ Dock*” (emphasis supplied).

U.L.P. 33-40). This is work which has always been performed by longshoremen exclusively (Tr. 55-56).

6. In *Steel*, the Board recognized that “neither [the steelworkers’] certification nor its contract specifically covers the work [in dispute]”. This is equally true of the Trades Council’s “Consent Determination of Representatives”⁴ and its contract in this case (Tr. 7, 24, 27; Employer’s Ex. No. 2, 4a; ATC Ex. 1). Indeed, the work in question did not even exist at the time of the 1947 consent election (Tr. 53). There were no classifications for it under the Trades Council contract until a month before the first arrival of the *LYSLAND*. The new classifications were established in September of 1965, in contemplation of the ship unloading operation (Tr. 96-97, 173, 185).

On the other hand, the longshore contract (Tr. 237, 275; Employer’s Ex. No. 8; ILWU Ex. No. 3) and certification (*Shipowners Association of the Pacific Coast*, 7 NLRB 1002, 1025, 1041 [1938]; *International Longshoremen’s and Warehousemen’s Union [American Mail Line]*, 144 NLRB 1432, 1440 [1963], both of many years standing, clearly cover the work here in dispute.

7. It would appear that a factor on which the Board relied heavily in the *Steel* case was that “longshoremen would have to be transported a considerable distance” in order to perform the work there in dispute. *That factor is not present in this case.* Here

⁴It is to be noted that such a “Consent Determination” is not a Board Certification, and for this reason, in addition to other reasons mentioned in the text, is not entitled to the same weight as a certification.

the longshoremen are available without the necessity for any traveling, they are available around the clock (Tr. 46, 226), and there is no question that they can perform the operation efficiently and economically.

8. In the *Steel* case, the employer was compelled, in order to comply with an Air Pollution Control District regulation, to shut down its open hearth furnaces (150 NLRB at 91; 378 F. 2d at 34). It therefore had to bring in the steel billets from the outside. In this case there was no such compulsion present. The employer simply chose, for reasons which seem best to it, to change its method of operation from bringing the alumina to its plant by railroad cars, to bringing it in by seagoing vessels (158 NLRB at 1026). Having chosen of its own free will to enter the business of ocean-going transportation and the unloading of waterborne cargo, the employer should not be heard to complain when the labor organization representing employees who traditionally perform such work makes a demand for it.

II.

SINCE THIS CASE IS NOT CONTROLLED BY THE STEEL CORPORATION CASE, THIS COURT IS FREE TO EXAMINE THE RECORD HERE WHICH DEMONSTRATES THAT THE BOARD'S DETERMINATION WAS ARBITRARY, CAPRICIOUS AND SHOULD NOT BE ENFORCED.

We have pointed out the significant differences between this case and *Steel*. These factors serve not only to distinguish the two cases but also show that the Board's assignment to production workers of the

tasks of operating cranes and using bulldozers to unload bulk cargo from ocean-going vessels is arbitrary and capricious and should not be enforced.

(1) The operation of cranes and the use of bulldozers to unload cargo from ocean-going vessels is traditionally longshore work. That such work constitutes a separate, unique and distinct category of work as used in Section 8(b)(4)(D) of the Act is not open to dispute.⁵ Federal legislation,⁶ the opinions of experienced commentators in the field,⁷ and the views of concerned federal agencies⁸ all attest to the fact

⁵8(b)(4)(D) refers to the assignment of "particular work" to employees in "particular" unions, trades, crafts or classes.

⁶See, e.g., 33 USCA 901, 903 (Longshoremen's and Harbor Workers Compensation Act, setting up a special system of industrial compensation for injured longshoremen).

⁷See Petersen, HANDBOOK OF LABOR UNIONS (American Council on Public Affairs [1944]), at pages 200, 202, for a statement of historic longshore jurisdiction: "loading and unloading of all floating structures" and "loading and unloading of vessels", and at page 365, for historic steel jurisdiction: "iron and steel manufacturing, processing and fabricating".

"A longshoreman has been defined as 'a laborer who works loading and discharging cargo' while a stevedore is 'a man in charge of the stowage of cargo and the boss of longshoremen. The stevedores are the foremen and the longshoremen are the laborers.' Bradford: A Glossary of Sea Terms (1944). The original of longshoreman appears to come from the words 'along shore'. 'Roustabouts' and 'dock wallopers' (the former, indicating laborers; the latter, loafers) are persons who handle cargo on river boats. Webster: New International Dictionary, Second Edition, Unabridged (1951)." NORRIS, MARITIME PERSONAL INJURIES, Second Edition, page 6.

⁸See U. S. DEPARTMENT OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (Washington, D. C., 1965): "LONGSHOREMAN (water trans.) I. 911.883. Operates material-handling equipment, such as power winch, . . . crane, . . . to transfer cargo into or from hold of ship and about dock area: Operates crane or winch to load or unload cargo, such as automobiles, crates, scrap, and steel beams, using hook, magnet, or sling in accordance with signals from other workers." (page 432; italics supplied).

that the work here at issue is longshore work, not production work.

The work here is a longshore operation in its almost classic form. A vessel brings cargo from South America to a dock in Vancouver, Washington. The cargo is unloaded from the ship by the use of cranes and bulldozers. The workers who do this work are doing longshore work. Indeed, this court reviews dozens of cases each year in which employees who perform this kind of work are regarded as longshoremen for the purposes of the federal statutes and who, as longshoremen, derive the benefits of the doctrine of unseaworthiness and the other doctrines of the maritime law. To assign this work to production workers is arbitrary and capricious and ignores not only the standards already referred to but the criteria established by the Board itself in *International Association of Machinists (Jones Construction Co.)* 135 NLRB 1402 (1962).

(2) All the relevant factors require an award in favor of the longshoremen and therefore the court should not enforce the Board's order.

(a) The *constitution* of the International Longshoremen's and Warehousemen's Union (ILWU Ex. 2) asserts jurisdiction over employees engaged in the unloading of vessels and operations incidental thereto. There is no evidence in this record concerning the constitutional claim of the Trades Council.

(b) The basic *certification* of the International Longshoremen's and Warehousemen's Union (*Ship-*

owners Association of the Pacific Coast, 7 NLRB 1002, 1025 [1938]) covers “everyone who works [in cargo handling] either on board vessels or on the docks”. It has been held to involve “in its broadest sense . . . the loading and unloading of waterborne cargo” (*American Mail Line*, 144 NLRB 1432, 1442 [1963]). It has been specifically held to include the operation of cranes (*Albin Stevedore Co.*, 144 NLRB 1443 [1963]; *Howard Terminal Co.*, 147 NLRB 359 [1964]).

What is the point of the Board issuing certifications and thereby establishing jurisdictional lines in industry, if those certifications can be disregarded by employers at a later date? The purpose of the Act is to issue stability and tranquillity in labor relations. One way the Board is supposed to do this is by certifying unions under Section 9 of the Act. If its certification can be ignored in subsequent proceedings under Section 10(k), the whole purpose of the Act is frustrated.

This is particularly true where, as here, there are no conflicting certifications. There is nothing in this record which establishes the substantive content of the Trade Council’s “consent determination” (Tr. 7-10), but it is clear from the contract (ACT Ex. 1) that it does not deal with the loading and unloading of vessels.

(c) The basic International Longshoremen’s and Warehousemen’s *contract* (Employer’s Ex. 8; Section 1.1) gives the longshoremen jurisdiction over “all

movement of cargo on vessels of any type or on docks or to or from railroad cars or barges at docks . . .”

The Trade Council's contract (ACT Ex. 1; Article 1) relates only to “the operation of the plant” and contains nothing which would justify its application to the discharge of waterborne cargo by means of cranes or bulldozers.

Collective bargaining contracts are supposed to provide for stability and tranquillity in labor relations, and if they are to be ignored in the assignment of work under Section 10(k) of the Act, then a Section 10(k) proceeding becomes a vehicle for disrupting rather than harmonizing labor relations.

(d) There is no question on this record regarding the comparative skills and abilities of the two classes of employees or their efficiency or the economy of using one group as against another. At the most, it can be said that these factors are evenly balanced.

CONCLUSION

If stability in labor relations is to be obtained, if the fruits of collective bargaining are to be retained by the employees involved, and if the objectives of the federal legislation in this area are to be properly served, this court must not enforce a Board order which would permit Aluminum Corporation of America to step outside the jurisdictional lines established on the Pacific Coast in the longshore industry. So long as the Aluminum Corporation man-

ufactures aluminum, it need deal only with aluminum workers. However, when it engages in unloading alumina from a seagoing vessel by means of conventional longshore equipment and thereby performs a conventional longshore operation, it should not be insulated from peaceful protests by longshoremen, if it assigns the work to non-longshoremen.

If the Aluminum Corporation can get away with that which it is attempting to do here, then every employer similarly situated irrespective of the product involved, can do likewise. This could result in a breakdown of longshore standards over a substantial portion of the industry on the West Coast. It could result in significant industrial strife between the longshoremen and the operators of so-called industrial docks. It could result in the breakdown of wages, hours and working conditions and the destruction of the mechanization-automation plan which has had such a hopeful beginning and which has recently received the Supreme Court's explicit approval. *Volkswagenwerk etc. v. Federal Maritime Commission*, 390 U.S. 261, 264, 278, 283 (per Harlan, J., concurring), 304-305 (per Douglas, J., dissenting in part) [1968].

This court must not permit the disruption of the industrywide automation program which the longshoremen have pioneered on the Pacific Coast. The ILWU has worked hard, and in the best traditions of constructive American collective bargaining, to set up a system which, while fair to the employers, gives the workingmen some measure of security against the in-

No. 22748 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

1968

MARY L. BRANDT and NATALIE Z. SAGE,

Appellants,

vs.

STEWART L. UDALL, Secretary of the Interior, and RAY-
MOND J. HANSEN,

Appellees.

Appeal From the United States District Court
Eastern District of California.

BRIEF FOR APPELLEE RAYMOND J. HANSEN.

GOODSTEIN & MOFFITT,
JOHN P. MOFFITT,

3424 Wilshire Boulevard,
Los Angeles, Calif. 90005,

*Attorneys for Appellee,
Raymond J. Hansen.*

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No. 22748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY L. BRANDT and NATALIE Z. SHELL,

Appellants,

vs.

STEWART L. UDALL, Secretary of the Interior, and RAY-
MOND J. HANSEN,

Appellees.

Appeal From the United States District Court
Eastern District of California.

BRIEF FOR APPELLEE RAYMOND J. HANSEN.*

Opinion Below.

The District Court's first unreported memorandum opinion and order are set out at pages 70-72 of the record. The District Court's second unreported memorandum opinion and order are set out at pages 226-228 of the record.

*This brief, with the permission of the United States Attorney's Office and pursuant to an Order of this Court, is based upon and is very similar to the one previously filed by the appellees in Case No. 21217.

Jurisdiction.

Jurisdiction of the District Court was attempted to be invoked by the appellants under :

- (a) The existence of a federal question, in that the construction and interpretation of the federal statutes and regulations and the fundamental requirements of due process are involved;
- (b) Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. sec. 1009;
- (c) The terms of 28 U.S.C. secs. 2201 and 2202, relating to declaratory judgments.

The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

Questions Presented.

1. Whether the determination of the Secretary of the Interior as to who is the first qualified applicant for an oil and gas lease is subject to judicial review, absent violation of statutory duty.

2. Whether the District Court erred in finding the Secretary's decision to be a reasonable construction and application of the Mineral Leasing Act.

Statutes Involved.

30 U.S.C. sec. 226(c) provides :

If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under sections 181-184, 185-188, 189-192, 193, 194, 201, 202-209, 211-214, 223, 224-226, 226-2, 227-229a, 241, 251, 261-263 of this title shall be entitled to a lease

of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of $12\frac{1}{2}$ per centum in amount or value of the production removed or sold from the lease.

Statement.

On June 12, 1959, appellants herein filed a noncompetitive oil and gas offer in the Los Angeles Land Office of the Bureau of Land Management, Department of the Interior. In this offer to lease, the names of the offerors appeared as follows:

Mrs. Mary L. Brandt, as to an undivided three-fourths interest and

Mrs. Natalie Z. Shell, as to an undivided one-fourth interest.

On June 25, 1959, appellee Raymond J. Hansen filed an oil and gas lease offer in the same Land Office for the identical mineral interest sought by the appellants in their prior-filed offer to lease.

By decision of the Land Office dated September 12, 1961 [R. 11], it was held that a lease could not be issued to the appellants in unequal proportions. This decision provided in part that the:

* * * subject offer is hereby held for rejection. However, the offerors are allowed the right to substitute within 30 days new offer forms (forms enclosed) eliminating any reference to unequal interests, without losing their priority. Failure to do so within the time allowed will result in the final rejection and closing of the case without further notice.

The right of appeal to the Director, Bureau of Land Management is allowed in accordance with the information in enclosed Form 4-1364 (September 1959), made a part hereof.

On September 25, 1961, appellants filed another oil and gas lease offer for the same lands. A protest to the issuance of an oil and gas lease to the appellants was filed by the intervening offeror, appellee, Raymond J. Hansen, on October 9, 1961. By decision of December 7, 1962 [R. 13, 14], the Manager of the Land Office stated:

As we are aware of no regulatory requirement which the offerors have failed to comply with in the original offer * * * the applicants appear to be entitled to the preference right accorded first qualified applicants, pursuant to Sec. 17 of the Mineral Leasing Act, as amended.

This decision was appealed by Mr. Hansen to the Director of the Bureau of Land Management. The Director, on October 8, 1963, modified and affirmed the Land Office Manager's decision [R. 15]. The Director held that [R. 16]:

It was error for the land office to require the offerors to submit amended lease forms. Consequently, the lease offer Los Angeles 1064406, as originally filed, is entitled to further consideration and issuance of a lease over the junior offer of Mr. Hansen * * *.

From the Director's decision, an appeal by Mr. Hansen was taken to the Secretary of the Interior. It is from this final decision [R. 17] in the administrative process to which the complaint below was directed. The

Secretary of the Interior reversed the decision of the Director of the Bureau of Land Management, holding as follows [R. 21-22]:

* * * It must be concluded then that the filing of the new Brandt-Shell offer constituted a withdrawal of the original offer; in any event, it superseded the original offer. * * *

The only way in which Mrs. Brandt and Mrs. Shell could have maintained their original offer would have been to appeal to the Director from the rejection of that offer, as they were advised and they had the right to do. They did not appeal; therefore they lost whatever rights they had in their original offer. * * *

* * * It is well established that the amendment of an oil and gas offer is effective only from the time the amendment is filed or that a defective offer becomes effective only from the time when the defect is cured. * * * The new offer could therefore have priority only from the date of its filing, which was subsequent to the filing of Hansen's offer.

* * * *

It is regrettable that the land office erroneously advised Mrs. Brandt and Mrs. Shell that they could file a new offer without loss of priority. However, since section 17 of the Mineral Leasing Act, as amended, 74 Stat. 782 (1960), 30 U.S.C. §226 (Supp. V, 1958), grants a preference right to a noncompetitive lease to the first qualified applicant, the land office had no authority to give the new Brandt-Shell offer filed on September 25,

1961, priority over Hansen's offer which was filed on June 25, 1959.

Appellants herein sought to overturn the Secretary's decision by filing a complaint for review, declaratory judgment and injunctive relief. The District Court, on June 7, 1966, entered findings of fact and conclusions of law [R. 73-75], concluding that it had jurisdiction under the Administrative Procedure Act, 5 U.S.C. sec. 1009; that the court was limited to a review of the administrative determination; that the court did not have the right to sit *de novo*; that the Secretary of the Interior has been delegated the right to administer the public domain of the United States; that the courts must show great deference to the interpretation given a statute by the officer or agency charged with its administration; and that "The interpretation of the facts and the statute, upon which his decision of March 5, 1965, is based by the Secretary of the Interior, is a reasonable construction and application of the facts and the statute." Judgment for the Secretary of the Interior was entered on June 7, 1966 [R. 81].

The Appellants then initiated an appeal to this Court. Said case was designated as No. 21217.

On November 15, 1967, this Court dismissed the appeal by Mrs. Brandt and Mrs. Shell "for lack of jurisdiction because of the absence of a Rule 54(b), Federal Rules of Civil Procedure, Order." [R. 202].

Appellee Hansen was then served with a copy of the Alias Summons on the Second Amended Complaint.

Any question with respect to a Rule 54(b) order then became moot because on March 26, 1968, the District Court granted Hansen's motion for a Summary Judgment [R. 226-228]. This appeal followed.

Summary of Argument.

I.

The Secretary of the Interior is charged by Congress with the responsibility of determining who is the first qualified applicant for an oil and gas lease of public lands. The Secretary has considered all the relevant factors and has correctly determined the priority of the appellants' offer to lease. This decision of the Secretary is reasonable.

The Secretary was fully aware that a mistake had been made by the Land Office in requiring the appellants to change their unequal interests in their offer to lease and that, by failing to appeal from this erroneous decision, appellants lost their priority to an oil and gas lease to an offeror who made application for the same lease prior to the submission of a second offer by the appellants.

II.

The District Court possesses only a very limited jurisdiction to review decisions of the Secretary of the Interior.

A. Absent violation of a statutory duty, the Secretary of the Interior has an unreviewable discretion to find facts and to interpret the applicable statutes in

managing the public lands of the United States. Appellants do not state what statute the Secretary allegedly violated. Furthermore, they do not state what facts give rise to this alleged violation.

B. Congress has plenary authority over the management and disposal of public lands. The Secretary has been, as a "special tribunal," delegated plenary authority to manage, lease and dispose of the public lands of the United States. In the absence of fraud or imposition, the Secretary's decision, made within the scope of his authority, is conclusive on the courts. The record is devoid of any facts giving rise to fraud or imposition on the part of the Secretary.

ARGUMENT.

I.

The Secretary of the Interior Correctly Determined That Appellants' Second Oil and Gas Lease Offer Is Subordinate in Priority to an Intervening Offer to Lease.

The Secretary of the Interior is charged with the responsibility of determining who is the first qualified applicant for an oil and gas lease. The Administration of the public lands of the United States is supervised by the Secretary of the Interior, who is charged with carrying out the will of Congress, as expressed by statute. The Congress has provided that, if it is determined by the Secretary that an oil and gas lease should be issued, "the person first making application * * * shall be entitled to a lease of such lands without competitive bidding." 30 U.S.C. sec. 226(c).¹

Here the Secretary, in his well-reasoned decision [R. 17-23], has determined that appellee Raymond J. Hansen filed the first *qualified* application to lease. Mr. Hansen has been issued a 10-year oil and gas lease pursuant to his application. Appellants seek the cancellation of this lease [R. 9] and the issuance of a lease to them. The Secretary was fully aware that the Land Office had erroneously determined that the appellants' offer to lease was defective and that the appellants had been erroneously advised that, unless a new offer

¹The question of determining priorities in filing times has been productive of much litigation. Applications in various factual situations have resulted in many fine distinctions on this subject. A few examples which are illustrative are *Wright v. Paine*, 289 F. 2d 766 (C.A. D.C. 1961); *Miller v. Udall*, 307 F. 2d 676 (C.A. D.C. 1962), cert. den., 371 U.S. 951; *Thor-Westcliffe Development, Inc. v. Udall*, 314 F. 2d 257 (C.A. D.C. 1963), cert. den., 373 U.S. 951.

was filed eliminating the 75-25 percent interest reference, they would lose their priority in filing.

The appellants were given, by the Land Office decision, two alternatives: (1) to appeal to the Director, maintaining that their offer to lease was valid and the Manager's decision was erroneous, or (2) to file a new offer to lease eliminating the unequal interest reference. Appellants chose the latter course, but Hansen's offer had intervened. Appellants argued to the Secretary that their original offer was never finally rejected, since they filed a new offer within the time allowed by the Land Office decision. The Secretary interpreted the Land Office decision as follows:

“In other words, the decision is to be read as saying that the old offer is defective and will be rejected unless a new substitute offer is filed; in that event, the old offer is supplanted and ceases to exist, consequently no final rejection of it is necessary” [R. 21].

The Secretary also found that the appellants could not have intended that there have been two offers pending at the same time since only one serial number, one filing fee and rental for one lease was ever paid. These were paid with the first offer and applied to the second offer. This, the Secretary found, demonstrated, without much doubt, that appellants intended their second offer to replace the original offer. In fact, appellants transmitted the second offer by letter dated September 26, 1961, stating “enclosed is *substitute* oil and gas lease offer” [R. 21]. This, the Secretary concluded, constituted a withdrawal of the original offer to lease or, in any event, it superseded the original offer. The failure of

appellants to appeal from the Land Office decision, which admittedly was wrong, lost appellants any priority in time which they may have had in their original offer.

The appellants' second or substitute offer to lease had priority, therefore, only from the date it was filed and was subject to any intervening offers which had been filed. In this case, an offer to lease had been filed on June 25, 1959, by Mr. Hansen, and was given priority over the appellants' substitute offer of September 25, 1961. It has been a consistent practice of the Department of the Interior that an amendment of an oil and gas lease offer is effective only from the time the amendment is filed or a defect in the offer is cured. *Mary Adele Monson*, 71 I.D. 269 (1964); *Duncan Miller*, 70 I.D. 512 (1963); *Sidney A. Martin, C.C. Thomas*, 64 I.D. 81, 85 (1957); HOFFMAN, OIL AND GAS LEASING ON FEDERAL LANDS 72 (1957). The appellants' new offer could therefore only have priority from the date of its filing. This would necessarily be so, even though the first offer was erroneously held for rejection. In the administration of this large volume of business, mistakes sometimes will happen. To be fair to all applicants, it is necessary that a consistent rule in determining priorities of filing time be applied. That has been done by the Secretary in this case. Where a decision of the Land Office is erroneous, one must appeal from it or be bound by its consequences. To rule otherwise would result in a breakdown in administrative finality.

In this connection, the magnitude of this real estate leasing program is important. As of June 30, 1959, the year that appellants' oil and gas lease offer was filed, there had been issued 131,974 oil and gas leases,

covering 107,155,290 acres. During fiscal year 1959, 55,956 new offers for oil and gas leases were received by the various Land Offices of the Department of the Interior (Annual Report, Secretary of the Interior, for fiscal year ended June 30, 1959, pp. 288-289). These figures reflect only oil and gas leasing activity, which is but a part of the volume of business handled in the Land Offices. In any business this size, there necessarily must be firm rules and consistent application of them or chaos inevitably would follow. There are also bound to be some mistakes made in the processing of offers to lease. In this case, a mistake was made in the Land Office, but due to the fact that intervening rights were involved, it was impossible to correct the mistake without affecting these other rights. If there had been no intervening offer to lease filed, there would be no problem presented. The problem here is that appellants failed to preserve their rights to a lease by appealing from the erroneous Land Office decision, and Mr. Hansen, who made no mistake, has obtained the sought-for oil and gas lease. It is essential that, in matters such as this, there be a consistent nationwide standard applied in determining the priority of offers to lease.

In this case, the Secretary was not bound by the erroneous statements of a Land Office official. On the contrary, he was bound to apply the Mineral Leasing Act and other public land statutes consistently throughout this country as he interprets them. The fact that misinformation was given the appellants is regrettable, but it cannot be the basis for changing the consistent practice followed by the Secretary in awarding an oil and gas lease. This is simply another case

similar to *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), where the Court held (p. 384):

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of this authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

This is, of course, another form of the basic rule that the Government cannot be estopped by the acts or nonactions of its agent. *Beaver v. United States*, 350 F. 2d 4 (C.A. 9, 1965), cert. den., 383 U.S. 937. To permit errors of local land offices to control the operation of the federal leasing program would be to produce unequal application of those laws and would make uniform application impossible.

II.

The Secretary of the Interior Has an Unreviewable Discretion to Find the Facts and to Interpret the Applicable Statutes in Managing the Public Lands of the United States, Absent Violation of a Statutory Duty.

A. *Congress has plenary authority over the management and disposal of the public lands.* The authority to dispose of public property by lease, or otherwise, rests exclusively with Congress. U.S. Constitution, Art.

IV, sec. 3, cl. 2. The Supreme Court, in *Alabama v. Texas*, 347 U.S. 272, 273-274 (1954), said:

The power of Congress to dispose of any kind of property belonging to the United States "is vested in Congress without limitation." *United States v. Midwest Oil Company*, 236 U.S. 459, 474: "For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress 'may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.' *Camfield vs. United States*, 167 U.S. 524; *Light vs. United States*, 220 U.S. 536." *United States v. San Francisco*, 310 U.S. 16, 29-30: "Article 4, §3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" *United States v. California*, 332 U.S. 19, 27: "We have said that the constitutional power of Congress [under Article IV, §3, Cl. 2] is without limitation. *United States vs. San Francisco*, 310 U.S. 16, 29-30."

The importance of this lies in the fact that, as this Court has held, persons desiring to secure lands under the public land laws have only such rights as those laws accord them. Thus, in *Northern Pac. R. Co. v. Cannon*,

54 Fed. 252 (C.A. 9, 1893), the railroad, under its land grant, was held to be “charged with knowledge of” the mining law provisions whereby a locator might foreclose rights of others without giving personal notice, when the land laws provided for publication, posting, and filing in the local Land Office.² So, also, claimants to public land are charged with knowledge of the historical function of the Secretary in determining all relevant problems as to entitlement under the land laws.

B. *The Secretary of the Interior, as a “special tribunal,” has been delegated plenary authority to manage, lease and dispose of the public lands of the United States.* The Supreme Court, in *Best v. Humboldt Mining Co.*, 371 U.S. 334, 336-338 (1963), said:

* * *the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them. *Cameron vs. United States, supra* [252 U.S. 450 (1920)]—an opinion written by Mr. Justice Van Devanter, who, as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character and distinction to the administration of the public lands—illustrates the special role of the Department of the Interior in that field. Cameron claimed a valid mineral discovery on public lands. His claim was rejected in administrative proceedings. Cameron, however, would not vacate the land

²The mining claimant's application to purchase was filed some six years after the railroad's map of definite location and when it was in possession.

and the United States sued to oust him. The Court said:

“By general statutory provision the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. . . .

* * * *

“Of Course the land department has no power to strike down any claim arbitrarily but so long as the legal title remains in the Government it does have power after proper notice and upon adequate hearing to determine whether the claim is valid and if it be found invalid to declare it null and void.” 252 U.S. 450, 459-460.

“Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts or forbid an inquiry and determination in the Land Department.” *Orchard v. Alexander*, 157 U.S. 372, 383. If a patent has not issued, controversies over the claims “should be solved by appeal to the land department and not to the courts.” *Brown v. Hitchcock*, 173 U.S. 473, 477. And see *Northern Pacific R. Co. v. McComas*, 250 U.S. 387, 392.

The term, “special tribunal,” is one that has been used by the Supreme Court since earliest times to de-

scribe the functions of the Secretary in land matters. It was used long before the present-day concept of administrative law or administrative tribunals originated. It was used in the literal sense of "tribunal" as a court. It meant that, in this field, the Secretary was, and is, the federal court for land disposal, and his decisions are conclusive within the area of his jurisdiction. Along this same line of reasoning, the Court in the case of *Sun Oil Company v. Udall*, 230 F. Supp. 381 (D.C. D.C. 1964) stated, at page 382:

The issue here is not whether this Court would have reached the same conclusions as did the Appeals Board, but rather, whether there is a 'rational basis for the conclusions reached' by the Board.

The courts may not entertain a suit, instituted against the Secretary by an unsuccessful applicant for public land, which questions the Secretary's disposition of that land on the ground it was based on an erroneous finding of fact (*Shepley v. Cowan*, 91 U.S. 330, 340 (1875); *Vance v. Burbank*, 101 U.S. 514, 519 (1879)), or upon an alleged misconstruction of statutes he must construe in disposing of the land (*Ness v. Fisher*, 223 U.S. 683, 691 *et seq.* (1912)), or upon an alleged misconstruction of a regulation which he has promulgated to implement such statutes. (*Chapman v. Sheridan-Wyoming Co.*, 338 U.S. 621, 630-631 (1950)) In short, the Secretary's decision is unassailable unless wrong beyond dispute. Time after time the Supreme Court has so held: *E.g.*, *United States v. Seaman*, 17 How. 225, 230 (1854); *Gaines v. Thompson*, 7 Wall. 347 (1868); *Litchfield v. Register and Receiver*, 9 Wall. 575 (1869); *Marquez v. Frisbie*, 101 U.S. 473, 475 (1879); *Quinby v. Conlan*, 104 U.S. 420,

426 (1881); *Lee v. Johnson*, 116 U.S. 48, 49 (1885); *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 48 (1888); *Bishop of Nesqually v. Gibbon*, 158 U.S. 155, 166 (1895); *DeCambra v. Rogers*, 189 U.S. 119, 122 (1903); *United States v. Chic. Mil. & St. P. Ry.*, 218 U.S. 233, 242 (1910); *Hall v. Payne*, 254 U.S. 343, 347-348 (1920). And see *Work v. Rives*, 267 U.S. 175, 183 *et seq.* (1925).

In *Riverside Oil Co. v. Hitchcock*, 190 U.S. 316 (1903), mandamus was sought to compel the Secretary of the Interior to change his decision that under the governing Act of Congress a forest reserve lieu-land selection must be accompanied by an affidavit that the land was nonmineral in character and unoccupied. In holding that a writ could not lie, the Court said (at pp. 324-325):

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

* * * *

* * * Whether he decided right or wrong, is not the question. *Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.* (Emphasis supplied)

This Court, in *Standard Oil Co. of California v. United States*, 107 F. 2d 402, 409, 410 (1939), cert.

den., 309 U.S. 654, recognized these same principles, stating as follows:

The disposal of the public lands is not a subject over which the “judicial power” of the United States is extended. It is a field in which the authority of the Congress is supreme. *Lee vs. Johnson*, 116 U.S. 48, 6 S. Ct. 249, 29 L.Ed. 570; Art. IV, sec. 3, clause 2, of the Constitution, U.S.C.A.

* * * *

If Congress has clothed the Secretary with general authority to administer the grant, and if his decision of fact in this instance was made within the scope of such authority, there can be no doubt that his decision is conclusive on the courts, in the absence, at any rate, of fraud or imposition. The holdings to this effect are too numerous for citation, but among those apposite are *Catholic Bishop of Nesqually vs. Gibbon*, 158 U.S. 155, 15 S. Ct. 779, 39 L.Ed. 931; *Cameron vs. United States*, 252 U.S. 450, 40 S. Ct. 410, 64 L.Ed. 659; *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 27 L.Ed. 875; *Wright v. Roseberry*, 121 U.S. 488, 7 S. Ct. 985, 30 L.Ed. 1039; *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 34 S. Ct. 907, 58, L.Ed. 1527; *Johnson v. Drew*, 171 U.S. 93, 99, 18 S. Ct., 800, 43 L.Ed. 88. (Emphasis supplied)

Other more recent cases on this issue are *Boesche v. Udall*, 373 U.S. 472, 476-477 (1963); *Best v. Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963); *Morgan v. Udall*, 306 F. 2d 799 (D.C. Cir. 1962), cert.

den. 371 U.S. 941 (1963). In the recent Supreme Court case of *Udall v. Tallman*, 380 U.S. 1 (1965) the Court stated, at page 16:

The general rule is that the judicial power will not be interposed to limit or direct the exercise of discretion by public executive officers with respect to pending matters within their jurisdiction and control, except in clear cases of illegality of action.

In the case at bar, the Secretary of the Interior has made the factual determination of who was the first qualified applicant for an oil and gas lease. Furthermore, the Secretary's decision was based upon the sound legal and logical premise that to permit ". . . both the original offer and the new offer to subsist at the same time would be absurd." [R. 21].

The gravamen of appellants' argument appears to be that the mere fact that the Land Office gave Brandt and Shell erroneous advice entitled them, *ipso facto*, to have the lease issued to them. As the Secretary stated, "the land office cited no regulation or other authority for its view and we know of none" [R. 22]. Therefore, the Secretary had no alternative but to reverse the decision and order to lease issued to Hansen. Had he ruled otherwise, he clearly would have acted arbitrarily, unreasonably, and contrary to established law.

Conclusion.

For the above reasons, it is submitted that the Secretary's decision is reasonable and should be affirmed, and that the District Court's decision to grant a motion for Summary Judgment in favor of the appellees herein was proper.

Respectfully submitted,

GOODSTEIN & MOFFITT,

JOHN P. MOFFITT,

Attorneys for Appellee,

Raymond J. Hansen.

BRIEF OF APPELLANT

**UNITED STATES COURT OF APPEALS
NINTH CIRCUIT**

No. 22749

See Vol. 3491

HOWARD ELECTRIC CO., a Colorado Corporation,
Appellant,

vs.

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION
NO. 570 and INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,**
Appellees.

~~~~~  
**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF ARIZONA, TUCSON DIVISION**  
~~~~~

**GORSUCH, KIRGIS, CAMPBELL, WALKER
AND GROVER**

FILED

MAY 11 1988

**Bennett S. Aisenberg
1900 Security Life Bldg.
Denver, Colorado 80202**

Attorneys for Appellant

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**UNITED STATES COURT OF APPEALS
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HOWARD ELECTRIC CO., a Colorado Corporation,
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INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION
NO. 570 and INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
Appellees.

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Appellant in its Complaint bases jurisdiction under Section 301 of the Labor Management Relations Act of 1947 as amended (29 U.S.C. 163) which reads as follows:

“Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”

STATEMENT OF CASE

This matter arises upon the United States District Court for the District of Arizona granting Appellees' (Defendants below) motion to stay proceedings pending arbitration. Plaintiff's complaint in essence alleges a collective bargaining agreement between the parties dated June 20, 1966 containing a provision (Article I, Sec. 4) that there shall be no stoppage of work either by strike or lockout because of any dispute over matters relating to this agreement. Said complaint further alleges that on or about August 31, 1967 Defendants ordered and coerced employees of Plaintiff to cease working for Plaintiff and in accordance with same, these employees did in fact walk off the job and ceased working for Plaintiff, and as a result Plaintiff has been damaged.

Defendants in making their motion for a stay of proceedings specifically admit the allegations of the complaint as being true (see page 2 of Defendants memorandum filed with Defendants motion for stay of proceedings). The United States District Court granted Defendants motion for a stay of proceedings pending arbitration. It is from this order that Appellant (Plaintiff below) takes this appeal.

QUESTION INVOLVED

WAS THE ORDER OF THE DISTRICT COURT PROPER IN RULING THAT IT SHOULD NOT DECIDE THIS CASE PENDING ARBITRATION?

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE QUESTION OF VIOLATION OF THE NO STRIKE CLAUSE IN THE COLLECTIVE BARGAINING AGREEMENT WAS AN ARBITRABLE ISSUE.

The general rule in cases where damages for breach of the "no-strike" clause is in issue is that such a matter is not arbitrable and that the United States District Court has jurisdiction over such matters under Section 301 of the Labor Management Relations Act, as amended (29 U.S.C. 163). See *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 8 L. Ed. 2d 462 (1962) and cases cited at page 13 of this Brief. The Appellees' position below was that the present case falls directly within the fact situation of *Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionery Workers International, AFL-CIO*, 370 U.S. 254, 8 L.Ed. 2d 474 (1962) which granted a stay of proceedings pending arbitration. It is the position of the Appellant that the current case differs diametrically and dramatically from the *Drake* case. It is here maintained that the *Drake* case must be limited to the specific fact situation of this case, and in fact, the United States Supreme Court so stated in its decision.

The facts in the *Drake* case are as follows: On December 16, 1959, the Company notified the Union and its employees that the employees would be required to work on Saturday, the day following Christmas and New Years, instead of the day before. The Saturday after New Years only 26 out of 190 employees showed up for work and the Company, based on this fact situation, filed a complaint for damages in the United States District Court alleging that the Union had instigated a strike in violation of the

no strike clause. The Union filed a motion to stay proceedings and in its affidavit in support thereof specifically denied that the Union had encouraged or instigated a strike.

The United States Supreme Court decided the *Drake* case on the particular arbitration clause in the contract, i.e. on the broadness of the language itself. The clause is cited here for convenience.

“Article V — Grievance Procedure

The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of *any clause or matter covered by this contract or any act of conduct or relation between the parties hereto directly or indirectly.*” (Emphasis supplied)

How different this clause is from the clause in the present contract will be pointed out later in this brief. Note, however, the underlined language. The Court specifically mentions this at page 258 of 370 U.S. where it states:

“Article V does not stop with disputes ‘involving questions of interpretation or application of any clause or matter’ covered by the contract. The adjustment and arbitration procedures are to apply to all complaints, all disputes and all grievances involving any act of either party, or any conduct of either party, or any relation between the parties, directly or indirectly. The company asserts there was a strike by the union in violation of the no-strike clause. It, therefore, has a ‘complaint’ against the union concerning the ‘acts’ or ‘conduct’ of the union. There is also involved a ‘dispute’ between the union and the company, for the union denies that there was a strike

at all, denies that it precipitated any strike, denies that the employees were obligated under the contract to work on that January 2, and itself claims that the employer breached the contract in scheduling work for the holidays.”

As pointed out in the language above, in the *Drake* case there was a true dispute as to whether there even was a strike, i.e. whether the employees were even supposed to be on the job on the day in question in that this was a Saturday, January 2, the day immediately following New Year's Day. The Court specifically states that the violation of the no-strike clause was a “complaint” rather than a “dispute” against the union concerning the acts or conduct of the union. The word “dispute” as found in Article V was involved also, in that the union denied there was a strike at all. Also it might be pointed out that the no-strike clause, Article V, has a specific provision requiring the company to arbitrate disciplinary action against strikers.

Furthermore, the United States Supreme Court relies very heavily on the fact that the company had shown its understanding of the arbitration clause a mere four months before, by requesting arbitration on a matter involving a strike, i.e. the employer by past practice had committed itself to a course of conduct. The Court said at page 260 of 370 U.S.:

“It would appear, then, that the company, just four months earlier in 1959, considered the fundamental matter of a union-led strike was a dispute to be arbitrated under the provisions of the contract.”

Finally, in *Drake* this was merely a one-day strike, if in fact it was a strike at all; not a permanent strike as in the present case.

Thus, it is clear that the *Drake* case must be limited to its particular facts and the Supreme Court so states at pages 265 and 266 of 370 U.S.:

"We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union. We do decide and hold that Article V of this contract obligates the company to arbitrate its claims for damages from forbidden strikes by the union and that there are no circumstances in this record which justify relieving the company of its duty to arbitrate the consequences of this one-day strike, intertwined as it is with the union's denial that there was any strike or any breach of contract at all. . . . This question, as well as what result will best promote industrial peace, can only be answered in the factual context of particular cases. Here, the union claims it did not call a strike and that the men were not bound to work on January 2, basing its claim upon years of past practice under the contract. The dispute which this record presents appears to us to be one particularly suited for arbitration, if the parties have agreed to arbitrate. We hold that they did so agree and will hold the company to its bargain." (Emphasis supplied)

Thus, it can be seen that *Drake Bakeries* involved a very broad arbitration clause which the Court interprets as applying to a suit for breach of the "no-strike clause."

Let us now look at the case at bar. The arbitration clause in question is Article I, Section 4:

"There shall be no stoppage of work either by

strike or lockout because of any proposed changes in the Agreement or disputes over the matter relating to the Agreement. All such matters must be handled as stated therein.”

Note the great, great difference between the clause in the present case and the *Drake Bakeries*’ clause. The *Drake* clause states, all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract, or any act or conduct or relation between the parties hereto, directly or indirectly. It is hard to conceive of an arbitration clause of broader application than that in *Drake*. The clause in the case at bar deals only with disputes and thus the question which must be decided by this Court is, “Is a stoppage of work or strike a dispute under the present contract?” If it is, it must go to arbitration. If a strike is not a dispute as used in Section 4, then it may be heard by the Federal Court under Section 301 of the Labor Management Relations Act of 1947, as amended, and there is no need for arbitration.

The Appellant maintains that to say a strike is a dispute under this clause is to totally misread this clause. In *Drake*, there was a broad arbitration clause and later in the contract a no-strike clause. This violation of the no-strike clause falls within the language “application of any clause”. In this contract, the very no-strike clause is in the same sentence as the clause setting up arbitration, and is the consideration or quid pro quo for the arbitration clause. To quote the oft quoted language of Justice Douglas in *Textile Workers’ Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 1 L.Ed.2d 972 (1957)

“Plainly, the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike.”

How much more conclusive this is when the very arbitration clause itself contains the no-strike language.

But further, holding that a strike is a dispute under the wording of this clause renders the clause absolutely meaningless. It is an example of circular reasoning and begs the premise. The clause in question clearly considers a dispute as separate from a strike in that it says there shall be no strike because of a dispute. The clause acknowledges disputes will exist and provides in the same sentence that such disputes will not permit strikes to exist. It would be contradictory to interpret a strike as a dispute. If a situation constitutes a dispute, then we should be able to substitute the situation for the word "dispute" and not render the sentence an absurdity. Let us go through a few examples of this. It is clear that the discharge of an employee can be a dispute as could be a unilateral change in wages by the company. Let us then substitute the particular dispute for the word "dispute", i.e.

There shall be no strike because of the discharge of an employee.

This makes sense.

There shall be no strike because of a unilateral change in wages.

This makes sense, but

There shall be no strike because of a strike.

This is meaningless and in fact it is a contradiction on its own face.

The very fact that the no-strike clause and the word "dispute" are mentioned in the same sentence shows that one does not include the other. The Latin expression "*expressio unius exclusio alterius*" (the mention of one thing implies the exclusion of the other) would apply here.

Under this clause, the very purpose of the disputes or arbitration clause is to avoid strikes or work stoppages. This is inherent in the very clause, i.e. there shall be no strike because of any dispute. To allow the employees to strike would be to encourage an illegal strike which is what the contract, by setting up an arbitration clause, tried to prevent. Obviously, in this case the union had a dispute over some phase of wages, hours or working conditions. The onus under the disputes clause is for the Union to take the dispute to arbitration. This it did not do, but there was a strike in violation of the contract. To allow the Union to do this is to encourage it not to invoke the arbitration or dispute procedure, but to commit a work stoppage or strike contrary to the very purpose of the disputes clause, which is to encourage arbitration. As the Supreme Court said in the *United States Steel Workers v. Warrior and Gulf Navigation Co. case*, 363 U.S. 574, 4 L.Ed. 2d 1409, (1960) at page 1417 of 4 L.Ed. 2d:

“The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, *rather than a strike*, is the terminal point of a disagreement.” (Emphasis supplied)

In the present case, unlike in the Drake case, the Union repudiated the very disputes procedure it now seeks to invoke. The Supreme Court in *Drake* says at pages 262 and 263 of 360 U.S.:

“. . . and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused *the circumstances of the claimed repudiation are critically important*. In this case the Union denies having repudiated in any respect its promise to arbitrate, denies that there was a strike, denies that the employees were bound to work on January 2 and asserts that it was the company itself

which ignored the adjustment and arbitration provisions by scheduling holiday work.” (Emphasis supplied)

No such circumstances are present in the instant case. The Union had a dispute to be taken to arbitration. This it did not do, but it engaged in an illegal strike in violation of the contract. No such mitigating circumstances as are present in *Drake* have been shown in our case nor indeed are any present.

Thus, the critical question the Court must answer is, did the parties intend a strike to be a dispute as set out in Article I, Section 4? That it may not be is clearly shown by the case of *Atkinson v. Sinclair Refining Company*, supra, pg. 3, decided the same day as the *Drake Bakeries* case. In *Atkinson*, the Court held that the arbitration clause was a limited one and thus did not compel arbitration.

“Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” 8 L.Ed. 2d at page 466.

It is here maintained that the strike in the present case, based on the restricted arbitration clause, was in no wise intended to be arbitrated, and hence this case falls outside the limited fact situation of the *Drake* case.

The no-strike pledge actually was the “quid pro quo” for the agreement to arbitrate in the instant case, unlike the situation that prevailed in the *Drake* case. This point is established by the language of Section 9 of Article I which demonstrates that it was never the parties’ intention

to submit questions of breaches of the no-strike, no lock-out pledge to settlement through the arbitration process.

Section 9 of Article I sets forth a condition precedent to any arbitration which cannot possibly be fulfilled in a situation involving a stoppage of work either by strike or by lockout. Section 9 provides:

“Section 9. When any matter in dispute has been referred to conciliation or arbitration for adjustment, the provisions and *conditions prevailing prior to the time such matters arose shall not be changed or annulled.*” (Emphasis supplied)

The “conditions prevailing prior” to the time a work stoppage, strike or lockout arises are the continuation of work on the project without strikes. Section 9 requires that such conditions (the continuation of work on the project without interruption) “shall not be changed or annulled” while arbitration proceeds. It is impossible to hold “conditions prevailing prior” to the time a work stoppage, strike or lockout arises in an unchanged or unannulled status. As soon as the work stoppage occurs everything changes on the job or the work is lost by the employer as happened in this case. Therefore, it is impossible to include work stoppages, strikes or lockouts within the meaning of the terms “matter in dispute” or “dispute” as used in Section 9 and Section 4 of Article I without rendering the rest of those provisions completely meaningless and absurd. Also, if the language of Section 9 imposing the requirement and condition that the “conditions prevailing prior to the time such matters arose” is to be awarded any meaning or effect whatsoever then the only conclusion that one can come to if it is desired to include the terms “work stoppage, strike or lockout” within the meaning of the term “dispute” is that the absence of a strike or work

stoppage is an essential condition precedent to invoking arbitration. This is also the clear intendment of Article II, Section 15, paragraph 2 of the parties' agreement wherein it states in pertinent part as follows:

"In the event of disputes or trouble arising on any job where workmen are employed hereunder, the workmen shall remain at their work and the shop steward shall notify the business manager of the union. Upon receipt of such complaints, the business manager shall proceed to the job and use his best efforts to adjust the trouble at the earliest possible time."

Since it is obviously impossible in strike or work stoppage situations to prevent change or annulment of the conditions that existed prior to the strike or work stoppage, it is the Appellant's position that it is clear from the language of Section 9 and Section 4 of Article I and Section 15 of Article II that it was never the parties' intention to submit questions concerning breach of the no-strike no-lockout pledge to the arbitration process. To read these provisions otherwise would, in effect, render Section 9 meaningless and eliminated from the agreement.

It is here contended that this case falls directly within the reasoning of *International Union, United Automobile Aircraft, etc., et al. v. Benton Harbor Malleable Industries*, 242 F. 2d 536 (6th Cir. 1957), wherein the arbitration clause read as follows:

"1. Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lock-

out on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure.”

The Court at page 540 stated as follows:

“Article III, paragraph 1, contains an unequivocal, unconditional obligation not to strike or engage in a work stoppage during the term of the contract. It recognizes that a ‘difference’ might arise between the Company and the union which, if not settled, would lead to a strike. It looks to a settlement of that difference by use of the grievance procedure, but there is nothing in that paragraph which relieves the unions of their unconditional obligation not to have a strike. The ‘difference’ or ‘grievance’ is to be arbitrated to a final conclusion, but while it is being arbitrated and regardless of how it is eventually decided and terminated, there is to be no strike. The thing to be arbitrated is the ‘difference’ or ‘grievance’, not the right to strike or any claimed justification for the strike. There was no right to strike. The arbitration called for by this paragraph of the contract was to be used instead of a strike not to determine whether the strike was justified after it had occurred. The right to strike was not an arbitrable issue under this paragraph of the contract.”

There are a myriad of other cases holding specifically that violations of the no-strike clause are not arbitrable. See: *Structural Steel & Ornamental Iron Assn. of New Jersey, Inc. v. Shopmens Local Union No. 545*, etc., 172 F. Supp. 354 (D NJ 1959); *Cuneo Press, Inc. v Kokomo Paper Handlers’ Union No. 34*, 235 F. 2d 108 (7th Cir. 1956); *Harris Hub Bed & Spring Co. v. United Electrical, Radio & Machine Workers of America, et al.*, 121 F. Supp. 40 (M D PA 1954); *International Union United Furniture*

Workers of America v. Colonial Hardwood Flooring Co., 168 F. 2d 33 (4th Cir. 1948).

Other drastic differences between the present case and the *Drake* case occur. First, the union in the *Drake* case even denied this was a strike. The issue in that case was whether the employees were supposed to work on January 2. The question of the existence or non-existence of a violation of the no-strike clause was involved. In the present case, there is no question that a strike or work stoppage is involved. See Appellees' Memorandum, page 2, where Appellees admit for purposes of their Motion to Stay that there actually was a work stoppage or strike. See also affidavit of Horace Bounds filed with the Appellees' Motion wherein he states in his last clause that a work stoppage or a strike occurred (whether the Union instigated same or not is a question of fact to be determined later).

Further, as pointed out earlier, in *Drake* the Court specifically indicated it was relying heavily on the company's past practice of arbitrating matters relating to illegal strikes. This evidenced the company's understanding of the disputes clause. No such past practice occurred in the present case.

Appellees to succeed must show that this case falls within the particular fact situation of *Drake Bakeries*. Although the Appellee has maintained below that the present case contains the same fact situation as *Drake*, we believe it has been clearly pointed out that this is contrary to fact. The United States Supreme Court has continually held that arbitration is a matter of contract and a party cannot be compelled to arbitrate any dispute it has not agreed to submit. *U. S. Steel Workers v. Warrior and Gulf Navigation Co.*, supra, pg. 9.

In *Drake*, the arbitration clause is extremely broad, i.e. all complaints, disputes or grievances, or any act or conduct or relation between the parties directly or indirectly. In the present case, it is only disputes which can be arbitrated and the clause specifically says that there shall be no strikes because of such disputes. If the purpose of arbitration is to further industrial peace and harmony, whose interpretation better satisfies this concept, the Company's or the Union's? It is strongly maintained the Union position rather promotes industrial strife.

Further, the Drake case contained a past practice concept and also there was a fundamental question as to whether the one day absence by the employees was in fact a strike at all.

One further case should be discussed. At the hearing on the Appellees' motion staying proceedings, the District Court in its discussion felt the present case fell within the purview of *Los Angeles Bag Co. v. Printing Specialties, etc.*, 345 F. 2d 757 (9th Cir. 1965) decided by the Circuit Court of Appeals for the Ninth Circuit and thus ruled in favor of staying the proceedings pending arbitration. Since the District Court relied heavily on this case decided by the present Court, Appellant feels it advisable to endeavor to point out to this Court why it feels the *Los Angeles* case is wholly and fundamentally different from the present case. The facts of the *Los Angeles* case are as follows:

The employer discharged twelve employees based on its contention that these employees had engaged in a work stoppage in violation of the agreement. A clause in the contract, namely, Article I, Section 4 reads as follows:

"In the event of any strike or stoppage *in violation of this agreement*, the company may discipline any employees' participation therein and any such disci-

pline shall not constitute a grievance within the meaning of Article II.''' (Emphasis supplied)

Thus when the employees filed a grievance, the employer refused to arbitrate, claiming Article I, Section 4 covered this matter and that there was no obligation to arbitrate. The employees, on the other hand, claimed:

- (a) This was not a work stoppage since the supervisor had authorized them to leave work early because of working conditions where the men were working.
- (b) If this was a work stoppage, it was not a stoppage in violation of the agreement as set out in Article I, Section 4.

Thus, in the Los Angeles case, the Union, (or employees) denied that a strike existed. In the present case, the Union has admitted throughout that a strike or work stoppage occurred (see page 2 of Appellees' memo brief and affidavit of Horace Bounds, last clause, wherein it states that a strike or work stoppage took place) although denying Union instigation.

The court then goes on to say that the employer has the right to assume as a matter of first instance that an unauthorized work stoppage occurred. However, if the employees challenge the employer's claim of unauthorized work stoppage by filing a grievance, then arbitration must be had.

The key words of the court are found at page 459.

"Employer's claim of unauthorized walkout, on its face was but a claim of alleged violation of the express provisions of Article I, Section 4, *that there*

should be no unauthorized walkout.” (Emphasis supplied)

Note the court relies heavily on the phrase “unauthorized walkout” for it is only an unauthorized walkout that is not subject to arbitration under Article I, Section 4. Article I, Section 4 states: “In the event of any strike or work stoppage in violation of this agreement”, i.e. an unauthorized strike or work stoppage. This, of course, is not our case for in our case it is *all* strikes or work stoppages, whether authorized or unauthorized, that are not subject to the disputes procedure.

Appellant agrees with the reasoning of the *Los Angeles* case. In that case, it was only matters relating to a strike in violation of the agreement which were not arbitrable under Article I, Section 4. The employees in that case denied there was a strike. Therefore, since there was a question as to whether there was a strike, or whether such a strike if there was one, was authorized or unauthorized, the matter had to go to arbitration. This is clearly not our case. The disputes clause in our case states: “There shall be no stoppage of work either by strike or lockout, etc.”. Nowhere is the word “strike” or “work stoppage” modified by the phrase “in violation of this agreement” as in the *Los Angeles* case. It is not merely illegal or unauthorized strikes or work stoppages that are non-arbitrable in our case, but all strikes or work stoppages.

The court was worried in the *Los Angeles* case that the employer could emasculate the arbitration provision by unilaterally interpreting every action of the employees as a walkout or work stoppage. At page 759 it states as follows:

“. . . to sustain employer’s contention would be to emasculate the arbitration provision of the contract

whenever the employer saw fit to unilaterally interpret any action of the employees as a walkout or stoppage.”

But that is not our case. Appellant is not unilaterally interpreting the action of the employees in not working as a strike or work stoppage. The appellees *admit* there was a strike or work stoppage, but merely question whether or not they instigated it. If the Union denied there was a strike or work stoppage in this case, we would have a different case and arbitration would have to be resorted to in order to resolve the question of whether a strike did in fact exist. But this the Union did not do because they could not in good faith deny same. They merely denied they instigated it. But whether this be a Union instigated strike, an employee instigated strike, a legal strike, an illegal strike, a wildcat strike, an economic strike, i.e., regardless of what kind of strike we have here, it falls within the wording of Article I, Section 4 of our contract which issues a blanket restriction against strikes or work stoppages of all kinds regardless of whether they are authorized or unauthorized, Union instigated or not. And further, as pointed out throughout this brief, the matter of strike or work stoppage is not subject to the disputes procedure.

A further difference must be pointed out. The Los Angeles contract contains the following article:

“Article II, Grievance and Arbitration. Section 2. Issues subject to the grievance procedure are limited to differences arising out of the interpretation, application or alleged violation of any of the express provisions of this agreement.”

Thus, any question regarding the interpretation or application of any provision must go to arbitration. There

was in that case a question regarding the interpretation and application of Article I, Section 4, i.e., was there a strike, was it authorized. Once again in our case there is no question that a strike or work stoppage occurred. In the present case, the District Court felt that since the Union denied that it instigated the strike, this matter should be arbitrated. It is interesting to note that the same claim was made in the *Drake* case as in the present case i.e. that the Union did not instigate the strike. But the Court in *Drake* did not even refer to this contention in rendering its decision. It decided the *Drake* case on the particular no strike clause in the *Drake* contract as pointed out earlier. Appellant submits that under the present contract, it matters not whether the strike was Union instigated or not, for it is all strikes which are not subject to the disputes procedure. There is a blanket restriction against strikes regardless of who instigates them. That a non-Union instigated strike is still a strike is pointed out by the language of *Jeffery-DeWitt Insulator Co. v. N.L.R.B.*, 91 F.2d 134 (4th Cir. 1957).

Thus, the court in the *Los Angeles* case correctly determined that if the Union raises the issue of whether there was a strike, and whether if there was, it was authorized, this must be arbitrated, because of the wording of Article I, Section 4 of the Los Angeles contract which distinguishes between illegal and legal strikes. But in the present contract there is no such distinction and, hence, once a strike or work stoppage occurs (as admitted by the Union), then all matters surrounding same are not a subject for arbitration and must be decided by a Federal Court under the reasoning as set forth in this brief.

Finally, there is a good question as to whether a Board of Arbitration has even the power to award dam-

ages, so fundamental to the Company's remedy in this action. See *Refinery Employees Union v. Continental Oil Co.*, 368 F.2d 447 (5th Cir. 1959) where the Court held that the arbitrator had no power to assess damages absent a clause allowing him to so do. This would render the Employer's entire action meaningless if the Arbitration Panel had no right to assess damages — the crux of the Company's remedy.

CONCLUSION

For the reasons stated in this Brief, Appellant respectfully prays that the order of the United States District Court be overruled and that this Court enter its order ordering the United States District Court to hear this case in its entirety.

Respectfully submitted,

GORSUCH, KIRGIS, CAMPBELL, WALKER
AND GROVER

Bennett S. Aisenberg
1900 Security Life Bldg.
Denver, Colorado

Attorney for Appellant

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 22749

HOWARD ELECTRIC CO., a Colorado Corporation,
Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION
NO. 570 and INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA, TUCSON DIVISION

GORSUCH, KIRGIS, CAMPBELL, WALKER
AND GROVER

Bennett S. Aisenberg
1900 Security Life Bldg.
Denver, Colorado 80202

Attorneys for Appellant



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**UNITED STATES COURT OF APPEALS
NINTH CIRCUIT**

No. 22749

HOWARD ELECTRIC CO., a Colorado Corporation,
Appellant,

VS.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION
NO. 570 and INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
Appellees.

REPLY BRIEF OF APPELLANT

REPLY ARGUMENT

Nothing has been raised in the Appellees' brief which changes the argument or position of Appellant, but Appellant feels constrained to file an answer brief reaffirming its contentions and distinguishing the cases cited by the Union.

First, although the Union blows hot and cold on whether there was in fact a work stoppage, it cannot be denied in reality that a work stoppage did exist. In the first place, the Union for purposes of its Motion for Summary Judgment

ment admitted the allegations of the Complaint as true. Secondly, the District Court in fact found that there was a work stoppage (RT-16) (Appellees brief page 3 f.n.).

Secondly, the Appellee in its brief on page 9 states that Howard refused to go to arbitration. In point of fact this is incorrect, and further is no part of the record before this tribunal. The Union Affidavit referred to by Appellee does state that Howard first requested the Joint Conference Committee to meet and then later requested cancellation of said meeting. This is correct, but the events which transpired between the request and the cancellation are not before this tribunal and Howard in no respect can be said to have refused to go to arbitration. The matter on which Howard requested arbitration is quite different from the matter which is before this tribunal.

The ultimate issue in this case is and must be "Does the particular clause in the Howard contract allow the matter of violation of a no-strike clause to go to arbitration?" Every clause must be analyzed on its own merits.

"We do not decide in this case that in those circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union. *Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionery Workers International, AFL-CIO*, 370 U.S. 254, 265, 8 L.Ed.2d 474 (1962)

The Appellee contends that the present case falls within the guide lines of *Drake*. The Appellant contends our clause is far more restrictive. It is as easy as that.

Appellee cites three cases which it contends sustains its position. All three are easily distinguishable. *Desert Coca-Cola Bottling Co. v. General Sales Drivers*, 335F. 2d 198 (9th Cir. 1964) and *Operating Engineers, Local 3 v. Crooks Bros. Tractor Company* 205F. 2d 282 (7th Cir. 1961) are easily distinguished. These cases did not involve a violation of the no-strike clause, but the interpretation of in one case the word "wages" and in the other the word "qualifications". The Court of Appeals in both cases held that the issue as to whether wages were involved in one case, and qualifications in the other was questionable. The words "wages" and "qualifications" were susceptible to different interpretations and whether overtime was to be considered wages or insubordination bore on qualifications was unclear. Hence, the Court was uncertain as to whether or not the particular fact situation was to be excluded from the arbitration procedure. But it is clear that if the Court was convinced that wages or qualifications were involved, it would abide by the collective bargaining agreement and forbid arbitration. See *United Aircraft Corporation v. Lodge 971 of the International Association of Machinists*, 360 F.2d 150 (5th Cir. 1966).

In our case, there is no question that a stoppage of work did occur. Howard so alleges, the Union concedes this and the District Court so found as pointed out earlier. Thus, we are not involved in the situation of *Desert* or *Crook* where the court is uncertain as to whether wages or qualifications are involved. Here, it is clear that a work stoppage occurred and thus these two cases are completely inapplicable. The only question in our case is "Is it the intent of Article I, Section 4 that the matter of an admitted work stoppage be submitted or excluded from arbitration. Howard contends that based on the reasons set forth

in its original brief it has been clearly shown that the parties did not intend this matter to go to arbitration.

Pietro Scalzitti Company v. International Union of Operating Engineers, 351 F.2d 576 (7th Cir. 1966) cited by Appellee may be distinguished based on the distinction between the particular contract clauses. The clause in this case differs greatly from the one in the Howard contract in that the wording reads "There shall be no stoppage of work until, etc." In our case, the wording is far more restrictive, i.e., there shall be no stoppage of work *because of a dispute*.

In summary, this court must determine this case based on our particular contractual provisions. Appellant could cite numerous cases since *Drake* in which the court has said the clause in the particular contract does not intend arbitration, i.e., see *Boeing Company v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 370 F.2d 969 (3rd Cir. 1967) wherein the Court inferred from the fact the arbitration clause was geared to employee grievances that it was not intended that a violation of the no-strike clause was arbitrable and see also *District 50, United Mine Workers of America, et al. v. Chris-Craft Corporation*, 385 F.2d 946 (6th Cir. 1967) wherein the contract contained an exclusionary clause regarding discharge because of a work stoppage. In the *Chris-Craft* case, the Court distinguished *Los Angeles Bag Co. v. Printing Specialties, etc.*, 345 F.2d 757 (9th Cir. 1965) based on the fact that in that case there was a factual dispute concerning whether an unauthorized work stoppage had in fact incurred, whereas in the *Chris-Craft* case it was admitted, and secondly, the *Los Angeles* case contained a general clause providing for arbitration of differences arising out of the interpretation, application

or violation of the express provisions of the agreement, whereas in *Chris-Craft* the clause was not so broad. Both distinctions are applicable to the present case. The Court in *Chris-Craft* said that a Court is not free to ignore the plain wording of the agreement and where the Court is convinced that a subject was not intended to be arbitrated, it should so rule.

And so this Court must of necessity focus on the particular wording of the Howard contract "There shall be no stoppage of work because of a dispute". Can it be said that under this wording the parties meant to submit the matter of a work stoppage to arbitration? Howard contends it is clear that this was not the intent of the contract, for to do so would render this clause meaningless as pointed out in our original brief. Further, subsequent clauses namely Article I, Section 9, providing for conditions prevailing prior to the time a dispute arose remaining unchanged and Article II, Section 15 Paragraph 2 where it is stated that in the event of dispute the workmen shall remain at their work, substantiate this interpretation.

CONCLUSION

Other cases relating to this issue are helpful to the court, but no other case can be determinative in that the ultimate determination in each case must rest on the particular contract clause. The guide lines set down in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 8 L.Ed.2d 462 (1962) and *Drake* must be used to set the framework for each particular determination. It is Howard's position that a reading of the Howard contract will make it clear

that the parties meant to exclude violations of the no-strike clause from the arbitration process.

Respectfully submitted,

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER

By: BENNETT S. AISENBERG
1900 Security Life Building
Denver, Colorado 80202

Attorney for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

BENNETT S. AISENBERG

Attorney for Appellant

Three copies of this brief mailed this 21st day of June, 1968, to:

IRA SCHNEIER
602 Arizona Land Title Building
Tucson, Arizona

Counsel for Appellees



